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Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms, with a Revised Edition of Blackstone's Commentaries

PREPARED BY

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FIFTEEN VOLUMES

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CHICAGO

Modern American Law

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PREFACE.

A majority of civil suits seek recovery of money judgments. The rules determining the amount a plaintiff shall receive in such cases are of vital importance. The profession and others interested in law will welcome, therefore, "Law of Damages," by Dean William Perry Rogers, A.B., LL.D., of the Cincinnati Law School, the first treatise in this Fourteenth Volume of Modern American Law.

The second treatise, "Law of Insurance," is by Professor Henry W. Humble, A.M., LL.B., of the University of Kansas. His work includes a full discussion of the legal aspects of life insurance, as well as of fire and maritime indemnity.

Former Judge George C. Holt, A.B., LL.B., LL.D., is the author of the text on "Admiralty Law." Though this subject usually receives scant consideration from the profession at large, a knowledge of its interesting history and underlying principles will more than compensate for the time spent in reading this treatise.

"Medical Jurisprudence," by Professor George Fitch Wells, LL.D., of the University of West Virginia, presents a very practical analysis of a difficult subject. It outlines particularly and definitely the

sort of evidence which must be produced in criminal prosecutions and in personal injury cases.

A useful compilation of legal forms is appended in this volume. These models have been selected and edited by Francis L. Harwood, A.B., LL.B., of the Chicago Bar. They cover a great variety of situations and will furnish to lawyer and layman a ready and reliable guide in the drafting of instruments.

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LAW OF DAMAGES

BY

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INTRODUCTORY.

CHAPTER I.

THE SUBJECT OUTLINED AND DEFINED.

1. **Brief historical statement.**—No branch of jurisprudence is more ancient than the subject of damages. The right of compensation for injury inflicted by another, and the manner of obtaining such compensation, must necessarily have been coeval with the beginning of civilization. One of the early rules governing human conduct provides that you must "So use your own that you shall not injure another's." A resulting consequence of this rule is that one who wrongfully injures another is liable and must respond in damages to the extent of that injury. It is immaterial whether the injury is to person or property, to one's rights or to his reputation. The law gives a remedy by a proper action to recover compensation as nearly as possible equal to the injury sustained.[1]

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[1] Jeffries v. Williams, 5 Exch. 792; Lamb v. Stone, 11 Pick. 527 (Mass.).

2. **Responsibility for wrongful act.**—While generally one may do what he chooses with his own property in the exercise of proper care, he has no right even here to do those things, wrongful in themselves, which injure others, such as to establish a nuisance on his own premises which deprives another of the enjoyment of his property or rights. And if he, in any manner, even innocently trespass on another's property he subjects himself to an action.

Thus, if in building a house on his own land, by accident a stone or brick or timber fall on his neighbor's lot, he may be sued for this trespass although there is no perceptible damage done.[2] And so if on his own property one does an act lawful in itself, but so negligently or unskillfully as to result in injury to another, he will be required to respond in damages for the injury.[3] Every wrongful act resulting in injury to another creates a responsibility to place the injured person in as good condition as he would have occupied had the injury not occurred, and as far as possible the law will enforce this obligation. There is a presumption of the law that damage has been sustained when one's rights have been violated. This is true whether the violation is a breach of contract or a tort. Even though no actual damage be shown, the law permits nominal damages to be recovered.

But where one uses his own property lawfully and

[2] Hay v. The Cohoes Co., 2 N. Y. 159; Stanton v. New York and Eastern Ry. Co., LEADING ILLUSTRATIVE CASES.

[3] Vaughan v. Menlove, 3 Bing. (N. C.) 468 (Eng.); Parker v. Foote, 19 Wend. 309; Mahan v. Brown, 13 Wend. 261.

with proper care, it may and does frequently follow that such use results in another's injury. In such case he will not be responsible for damages. He may erect a building that will cut off his neighbor's light, or he may pull down his own wall or his own house though his neighbor's wall or house is thereby injured. Such acts are supposed not to be wrongful.

3. **Recent development of the subject.**—While the subject of damages is ancient, its development as a distinct branch of the law is comparatively recent. Formerly it was discussed as a subdivision of some other main subject, such as torts or contracts. It is now scheduled as a distinct course in most of the law schools and is the subject of well-written treatises. Increasing complexity in the relationship of men in business affairs, such as master and servant, employer and employee, principal and agent, produces frequent chances for injury and has caused rapid development of this branch of the law, as indicated in the many cases which have arisen in the courts.

4. **Duty of court and jury.**—The duty of the court to instruct the jury relating to the law governing the parties' rights under varied conditions required the formulation of legal rules. These instructions have, on appeal to courts of final resort, been reviewed and discussed, revised and adapted, until they have finally been crystallized into a system which we call the Law of Damages. In this development, as in the growth of other branches of law, the functions of the jury have become more limited, while the powers of the court have been enlarged.

Formerly it was supposed that the finding of the jury was binding on the court, and that it was beyond the court's province to set a verdict aside because the damages assessed were either too large or were insufficient. In the early case of Hawkins v. Sciet,[4] where the jury returned a verdict for £150 damages, the court regarded this excessive and at first ordered the amount reduced to £100. "But afterwards upon great consideration they revoked this and would not change the course of law and resolved to leave such matters of fact to the finding of the jury."[5] A few years later, Holt, C. J., set aside a verdict which he regarded exorbitant. He said: "The jury were very shy of giving a reason of their verdict, thinking they have an absolute despotic power, but I did rectify that mistake, for the jury are to try cases with the assistance of the judges."

Courts no longer hesitate to set aside judgments which they regard either too large or too small. They esteem it a duty incumbent upon them to grant new trials in cases where in their judgment juries have returned verdicts which are unreasonable and unsupported by the evidence.

5. **Jury's power broader in tort than in contract actions.**—But the jury still has much broader powers in all those cases of tort where it is impossible to measure the damages exactly than where the tort has resulted in a property or money loss, which may be approximately determined. So in actions of

[4] King's Bench (1622) Palmer 314.

[5] Lord Townsend v. Hughes, Common Pleas 2 Mod. 150; Delvis v. Wyer, Common Pleas 1 B; Ash v. Lady Ash, King's Bench Comb. 357.

slander or libel, in cases where suffering and anxiety or mental anguish or humiliation are elements of damages to be taken into consideration, courts hesitate to disturb the jury's verdict, although it may seem much too large, and the amount is far greater than the court would have given had the case been tried without a jury.

In the early case of Huckle v. Money,[6] the court, discussing the question of setting aside the jury's verdict in an action for false imprisonment on the ground that the amount assessed against the defendant was excessive, said that "the measure of damages in such cases is vague and uncertain," and that it is very dangerous for judges in such cases to intermeddle with the jury's finding. The court asserted that "it must be a glaring case, indeed, of outrageous damages in tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages."

Many courts following the precedent of this case have refused to set aside verdicts in tort actions where the damages were uncertain, unless it could clearly be seen that the verdict was the result of some error or fraud or was manifestly based on passion or prejudice.[7] Courts will more readily set aside verdicts for excessive damages in actions for breach of contract because here it can more accurately be determined whether or not the amount assessed far exceeds proper compensation to the

[6] 2 Wilson K. B. 205 (Eng.).

[7] Ohio & M. Ry. v. Judy, 120 Ind. 397; Coleman v. Southwick, 9 Johns. 45, 6 Am. Dec. 253; Stuart v. Hoffman, 68 Cal. 381.

plaintiff.[8] The fact that a verdict has before been set aside, even more than one time, does not limit the court's power to grant a new trial again because the verdict is too large.[9]

6. **Damnum absque injuria.**—Before damages may be recovered there must be some loss sustained traceable to the wrongful act of another. Not every injury, therefore, is a sufficient ground upon which to found an action. It is not unusual to find injuries for which there is no remedy at law. A defendant's act when lawful may produce injury, as where he erects his building upon his own land but so near to the plaintiff's residence that thereby the light and air are cut off.[10] The ownership in property is not permitted to stand in the way of public welfare. Buildings may be destroyed for the purpose of preventing spread of fire in case of inevitable necessity, or when they have for other reasons become dangerous to the public; and although there is a complete loss to the owner, he has no right of action against anyone.[11] One may be put to great expense in defending an action unsuccessfully prosecuted against him, without remedy against anyone. For each may test, in a court of justice, his claim against another.

Where both plaintiff and defendant were rightfully using a highway and plaintiff's horse became frightened at an engine which defendant was moving on the highway, resulting in plaintiff's injury,

[8] Lockwood v. Onion, 56 Ill. 506; Wallace v. Brown, 17 Ark. 449.
[9] Shaw v. Boston and W. R. Corp., 8 Gray 45 (Mass.).
[10] Penn. Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453.
[11] Surocco v. Geary, 3 Cal. 69; Hale v. Lawrence, 21 N. J. L. 714.

it was held that plaintiff had no right of action for his injury.[12] In such case defendant is not liable for damages, because his acts are lawful. "The refusal or discontinuance of a favor gives no cause of action. If one trusts to a mere gratuitous promise of favor from another and is disappointed, the law will not protect him from the consequences of his undue confidence, nor encourage carelessness or want of prudence in affairs. Damages can never be recovered where they result from a lawful act of the defendant. The exercise of a right conferred by a valid contract, in the manner provided by its terms, cannot be the ground of an action. The law will not inquire into the motives of the party exercising such right, however unfriendly and selfish."[13] Injuries of this character are held to be damnum absque injuria. There is damage to the plaintiff without the violation of his legal rights.

There are a few cases which seem to hold that where plaintiff has been injured by an act of defendant which in itself was neither wrongful nor negligent, plaintiff may, nevertheless, recover for the damages sustained.[14] But it is believed that the cases apparently supporting this proposition may be explained on the theory that the defendants were charged with a duty with which they had not fully complied in relation to the injury produced. If

[12] Favor v. Boston & Lowell R. R. Co., 114 Mass. 350; Mullker v. Harlem R. R. Co., 197 U. S. 557.

[13] Randall v. Hazelton et al., 12 Allen 412 (Mass.), LEADING ILLUSTRATIVE CASES.

[14] Fletcher v. Rylands, L. R. 1 Ex. 265; Hay v. Cohoes Co., 2 N. Y. 159; Smith v. Fletcher, L. R. 7 Ex. 305.

the decisions cannot be distinguished because of their peculiar facts, then it must be said that they stand opposed to the general rule on this subject.

7. **Contribution between tort-feasors.**—The general rule is that where two or more persons jointly injure another, and some of them pay the injured person in full for the damage sustained, they can recover nothing in contribution from their associates in the wrongful acts. The reason for this rule is that the plaintiffs in this action for contribution, in stating their cause of action, are bound to disclose their own wrongful conduct, which, when stated, discloses the fact that they are in no condition to set the wheels of justice going in their own behalf, and that to do so would be against public policy.[15] If this rule is limited to willful torts, it seems unobjectionable. The courts should not be called upon to aid one who has willfully injured another, even against the wrong of his associates. But torts are not always willful or intentional. They are sometimes innocently committed; and where this is shown to be so, there would seem to be no good reason for refusing contribution between tort-feasors. The tendency of judicial decisions seems now to incline more liberally toward tort-feasors who have acted in good faith or under some mistake connected with the injury, and who, therefore, did not know at the time that such acts were wrongful.

The rule, as stated in Jacobs v. Pollard,[16] covers

[15] Davis v. Gelhaus, 44 O. St. 69, 4 N. E. 593; Boyer v. Bolender, 129 Pa. St. 324, 18 Atl. 127, 15 Am. St. Rep. 723.

[16] 10 Cush. 287 (Mass.), 57 Am. Dec. 105.

both phases of the question as follows: "No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act by seeking an indemnity or contribution from those with whom or by whose authority such unlawful act was committed." But the rule is modified by an exception based upon public policy which prevents its application in cases where parties have acted in good faith without any unlawful design, although they have thereby infringed upon the legal rights of others. It is only where a person knows, or must be presumed to know, that his acts were unlawful, that the law will refuse to aid him in seeking indemnity or contribution.[17]

[17] Farwell v. Becker, 129 Ill. 261, 16 Am. St. Rep. 267, LEADING ILLUSTRATIVE CASES; Bailey v. Bussing, 28 Conn. 455; Acheson v. Miller, 2 O. St. 203, 59 Am. Dec. 663; Boyer v. Bolender, 129 Pa. St. 324, 15 Am. St. Rep. 723 and note.

CHAPTER II.

LIQUIDATED DAMAGES.

8. **Reason for liquidated damages.**—It is not unusual for parties to anticipate the results of a breach of a contract by either of them. They may deem it advisable to determine in advance what amount should be paid because of such breach. This the law permits them to do. The amount which the parties agree shall be paid by him who violates the contract is termed liquidated or stipulated damages. It is sometimes difficult to determine whether the amount thus stipulated for is actually damages or only a penalty. If a penalty, it will not be enforced by the courts, but the party injured by the breach will be permitted to recover the actual damage sustained. Courts of law will refuse to enforce penalties on the same grounds that equity will enjoin their enforcement, namely, that they are inequitable and unjust. They go beyond compensation for the damages sustained on account of a breach of the contract, and, in addition, seek to penalize the defendant. This, it is believed, one party to a contract should not have power to impose upon another, and the courts justly endeavor to discourage such contracts.

9. **How the question is solved.**—The solution of the question whether the amount stated by the parties shall be held to be a penalty and thus un-

enforcible, or a valid agreement for liquidated damages, must be determined by the language of the contract, and the intention of the parties, together with all the facts and circumstances in each case. If, in advance, it can be seen that the amount of damages is uncertain and the amount agreed upon is not unreasonable as a compensation for the breach, it will be regarded as liquidated damages. If, however, the damages are definite and certain, and the amount agreed upon is unreasonably large, it will be held to be a penalty, and hence unenforcible. Where the contract provides for the performance of more than one act, and the amount agreed upon is payable on failure to perform any one of the acts and is greatly in excess of the compensation for such breach, it is held to be a penalty notwithstanding the uncertainty of the damages caused by the breach.[18]

Where there is a doubt whether the amount agreed upon is a penalty or liquidated damages, courts are inclined to construe it to be a penalty.[19] It was held in Richardson v. Woehler[20] that a contract providing for forfeiture of all wages due if the employee should leave without just cause was unenforcible because unreasonable. On the other hand, in Tennessee Mfg. Co. v. James,[21] where, in such a contract,

[18] Jemmison et al. v. Gray et al., 29 Ia. 537; Shreve et al. v. Brereton et al., 51 Pa. St. 175; Taylor v. Times Newspaper Co., 83 Minn. 523, 86 N. W. 760; Railroad v. Cabinet Co., 104 Tenn. 568, 58 S. W. 303.

[19] Amanda Cons. Gold Mining & Mill Co. v. People's Mining & Milling Co., 28 Col. 251, 64 Pacific 218; Shute v. Taylor, 46 Mass. 61; Cushing v. Drew, 97 Mass. 445; Longworth's Executors v. Askren et al., LEADING ILLUSTRATIVE CASES.

[20] 26 Mich. 90.

[21] 91 Tenn. 154.

the amount agreed to be forfeited was both certain and reasonable, it was held to be liquidated damages. Ordinarily the amount mentioned in a bond is a penalty but it may be shown that it was intended for liquidated damages, and the court will so construe it if the facts proven bring it within the rules heretofore stated.[22]

While the courts will construe words, prima facie, in their ordinary meaning, they will not be bound strictly by the language found in the contract, but will look to the subject matter and to the ultimate results of a breach to determine the proper meaning of the language used. So where, in a contract relating to the sale of a newspaper, it was stipulated by the former owner that he would not again publish a newspaper in that city for a period of twenty-five years under a penalty of $1,250, the court held the amount stated to be liquidated damages.[23]

10. **Sales and building contracts.**—Contracts for liquidated damages are frequently made in connection with sales of various kinds of business, the vendor binding himself not to engage again in the business within a limited territory. In this connection the contracts are ordinarily held to be valid as for liquidated damages and not penalties. If the vendor violate his contract he may be required to pay the damages agreed upon, and may also be enjoined from continuing the prohibited business.[24]

[22] Henry v. Davis, 123 Mass. 345.

[23] Robinson v. Centenary Fund and Preachers' Aid Society, 68 N. J. L. 723, 54 Atl. 416.

[24] Augusta Steam Laundry Co. v. Debow, 98 Mc. 496, 57 Atl. 845; Johnson v. Gwinn, 100 Ind. 466.

Contracts for liquidated damages are often entered into in connection with building contracts, wherein an amount is agreed upon as damages for failure to complete the work within the time fixed by the contract. Such collateral contracts are binding when properly drawn, but the owner's desire to make the amount agreed upon sufficiently large to induce the builder to complete the work within the specified time, has frequently defeated the purpose in view. When tested in court the disproportion between the amount stipulated and the actual or probable damage on account of the delay frequently proves the contract to have been not for liquidated damages, but for a penalty.

In Haliday v. United States,[25] the contract provided for a penalty of $25 a day for failure to complete a house before a day named. The court held that this amount was not based upon damage for the delay, but was a mere penalty which would not be enforced. So where it was agreed that $20 a day should be forfeited by the contractor for every day's delay in the completion of a house, the amount to be deducted from that which might be found to be due him, it was held that the contract provided for a penalty.[26] But in a similar contract where the amount stipulated to be paid for delay was $5 a day it was held to be a valid contract for liquidated damages.[27] These cases illustrate the rule that where the amount of actual damages may be easily determined in

[25] 33 Ct. Cl. 453.
[26] L. P. & J. A. Smith v. United States, 34 Ct. Cl. 472.
[27] Young v. Gaut, 61 S. W. 372, 69 Ark. 114.

advance, and the amount stipulated is unreasonably large, it will generally be regarded as a penalty, whatever the parties in the contract have designated it to be.

11. **Rules of construction.**—Since the law favors indemnity rather than a penalty, where it is doubtful whether the sum named in a contract should be held to be liquidated damages or a penalty, it should be construed as a penalty. Courts are inclined to adopt that construction which will most nearly permit plaintiff to recover an amount equal to the damages he has sustained. So when there is nothing proven which requires the court to hold that the sum mentioned is liquidated damages, even though the parties have used those words in the contract, the court will hold it to be a penalty. The name by which the parties have designated the amount is of slight weight with the courts, if surrounding circumstances and the intention of the parties indicate an opposite meaning.[28] Where from the nature of a contract the damages cannot be determined with any degree of certainty the amount stated in the contract will generally be held to be liquidated damages when so designated by the parties.[29] Even the intention of the parties as gathered from the contract will sometimes be overturned by the court in cases of this kind. If the parties provided for greater damages than the law permits, such as usurious interest, or if they have

[28] Willson v. Mayor, 83 Md. 203; Monmouth Park Assn. v. Wallis Iron Wks., 55 N. J. L. 132; Hennessy v. Metzger, 152 Ill. 505.

[29] Hennessy v. Metzger, 152 Ill. 505; Lynde v. Thompson, 2 Allen 456; Wolf v. Des Moines, etc., Ry. Co., 64 Ia. 380.

named an excessive sum where the real damages are certain or may easily be ascertained, or if they have agreed upon an amount which would appear to be unconscionable, in all such cases the sum named will be construed to be a penalty, whatever the parties may have intended.[30] In Carruthers v. Gay,[31] the contract provided that the amount to be paid on its breach should be twice the actual damages sustained. This, of course, was held to be a penalty.[32]

12. **Actual damages necessary.**—In order to recover liquidated damages, not only there must be a breach of the contract but some actual damages must be sustained. In Hathway v. Lynn,[33] defendant had contracted with plaintiff that he, defendant, would at certain times and places continue the running of a bus line which would be beneficial to plaintiff. In consideration of defendant's promise plaintiff agreed to refrain from running a bus line in that place. The parties agreed upon $200 in case of breach of the contract as the sum to be paid by the party breaking the contract. Plaintiff, contending that defendant had broken the contract, sought to recover the $200.

The court said it was not necessary to determine whether the amount agreed upon was a penalty or liquidated damages, for notwithstanding it was the latter, it was nevertheless clear that plaintiff had sustained only nominal damages by defendant's

[30] Monmouth Park Assn. v. Wallis Iron Wks., 55 N. J. L. 132, LEADING ILLUSTRATIVE CASES.

[31] Texas 91 S. W. 593.

[32] Bradstreet v. Baker, 14 R. I. 546; Greenleaf v. Stockton C. H. and A. Works, 78 Cal. 606; Hurd v. Dunsmore, 63 N. H. 171.

[33] 75 Wis. 186.

breach, and that this would not justify the collection of liquidated damages. "In such a case," the court asserted, "before any liability to pay the liquidated damages can attach to the party in default, he must have been guilty of a substantial breach of his agreement—a breach which has resulted in something more than mere nominal damages to the other contracting party. This rule is so manifestly just that no discussion of it is necessary."

The question has been but little discussed by the courts but it seems reasonable to hold that where only nominal damages have been sustained, the liquidated damages agreed upon by the parties may not be recovered. On the other hand, it has been frequently held that if plaintiff is entitled under his contract to liquidated damages, he is required only to prove this contract, and that it is not necessary in such case for him to prove actual damages.[84]

13. **Alternative stipulations.**—Contracts which contain stipulations by which one is to do a certain act or pay a definite amount of money, fall within the scope and discussion of liquidated damages although they differ somewhat from those contracts usually considered under this branch of the subject. The amount agreed to be paid can be regarded neither as a penalty nor liquidated damages, but a sum which the party may elect to pay instead of performing the act. It cannot be damages for breach of contract, because in paying it he is only fulfilling his contract. It cannot be a penalty be-

[84] Charleston Lumber Co. v. Friedman, 64 W. Va. 151; Howard v. Adkins, 167 Ind. 184.

cause it is not a sum imposed either to induce the party to perform a contract or to punish him for failure to perform it. The courts, therefore, finding that the parties have agreed the amount shall be paid as a condition for doing or having failed to do some particular thing, do not enter upon the discussion of whether the sum represents damages or a penalty, but having found the other alternative unperformed, enter judgment for the amount of money for which the parties stipulated.

The principle is illustrated in Smith v. Bergengren.[35] The defendant agreed not to practice his profession in Gloucester so long as plaintiff was practicing there, provided he should have the right to do so at any time after a fixed period on paying the plaintiff $2,000, but not otherwise. Defendant began practice before the time had elapsed but refused to pay the $2,000. The court said the amount thus agreed upon was neither liquidated damages nor a penalty, but a price fixed for what the contract permitted defendant to do. Having begun the practice he must pay the $2,000. Many cases support this theory.[36] It may be said, however, that if the form of alternative stipulations is used with a view and for the purpose of imposing a penalty on one of the parties to the contract, the court will disregard the form, and finding the sum named to be a penalty will refuse to enforce it.[37] Where damages are stipulated both parties are

[35] 153 Mass. 236, LEADING ILLUSTRATIVE CASES.

[36] Bane v. Gridley, 67 Ill. 388; United Shoe M. Co. v. Abbott, 158 Fed. 762; Beck v. Indianapolis L. & P. Co., 36 Ind. App. 600, 76 N. E. 312.

[37] Bell v. Fruit, 9 Bush. 257; Burrage v. Crump, 48 N. C. 330.

bound by the agreement. The plaintiff will not be permitted to introduce evidence of greater damages, nor will the defendant be allowed to reduce the amount stated in the contract by proving the actual damage to be less than that sum.[38] It should be remembered, however, that if the court determines that the amount agreed upon is a penalty, the plaintiff may then recover actual damages, because he fails to recover stipulated damages.

[38] Catterlin v. Voney, 177 Fed. 527; Howard v. Adkins, 167 Ind. 184.

CHAPTER III.

EXEMPLARY DAMAGES.

14. **The term defined.**—Exemplary or punitive damages, sometimes called smart money, are imposed on defendant by way of punishment for the wrong inflicted. They are not given in cases of mere negligence, but only when the act causing injury is done willfully or maliciously, or with such gross negligence and want of care for the rights of others as to justify the presumption of willfulness. Such damages are given in addition to compensatory damages for the purpose of preventing a repetition of such conduct by the defendant and to make of his case an example to deter others from similar offenses. There is much conflict of opinion on this subject. On the one hand it is said to be a clear judicial right and power, in the absence of legislative authority, to impose upon a willful wrongdoer a heavier burden than could be adjudged against one who had innocently or by mistake injured another. And the fact that this additional penalty inures to the benefit of the plaintiff and is not, like other fines, paid to the state, is thought to be no objection to its imposition. The great weight of authority favors this view.

The following extract from Brown v. Evans[39] very fairly states the position usually taken by the courts:

[39] 17 Fed. 912; Kurtz v. Frank, 76 Ind. 594, LEADING ILLUSTRATIVE CASES.

"It may be laid down as a general proposition of law, elementary in character, that in all this class of cases of personal torts, vindictive actions such as assault and battery, slander, libel, seduction, malicious arrests and prosecutions, seizure of goods, etc., where the elements of fraud, malice, gross negligence, cruelty, oppression, brutality, or wantonness intervene, exemplary or punitive damages may be recovered from the defendant. The authorities supporting this proposition are too numerous to cite or review here. An examination of a few of the authorities will establish the fact that this has been the settled law of this country for more than one hundred years, and that such is now the law in nearly all the states of the Union."

15. **Objections to the doctrine.**—On the other hand many courts and able jurists insist that the doctrine is untenable and should have no place in the court's civil jurisdiction. They contend that the power to punish wrongdoers belongs exclusively to criminal courts and that proceedings for this purpose should be conducted by the state, and that the legislature does, or should, provide statutes embracing all such matters. They claim that a plaintiff who brings a civil action on account of an injury received should be entitled only to compensation from defendant.[40] In Murphy v. Hobbs[41] the court, discussing this question, says: "Civil actions are instituted for the purpose of redressing private wrongs; it is the aim of civil jurisprudence to mete

[40] 2 Greenleaf Ev., § 253; Field on Damages, 28; Bass v. Chicago & N. W. Ry. Co., 42 Wis. 654; Fay v. Parker, 53 N. H. 342.

[41] 7 Col. 541.

out as nearly exact justice as possible between contending litigants; there ought to be no disposition to take from the defendant or give to plaintiff more than equity and justice require."

It is insisted that under this doctrine these principles are forgotten, and judicial machinery is used for the avowed purpose of giving plaintiff that to which he has no shadow of right. It is said that he recovers full compensation for the injury to his person or property; for all direct and proximate losses occasioned by the tort; for the physical pain, if any, inflicted; for his mental agony, lacerated feelings, wounded sensibilities; and then, in addition to the foregoing, he is allowed damages which are awarded as a punishment of defendant and example to others. Many judges insist that there is no valid reason why plaintiff, after being fully paid for all the injury inflicted upon his property, body, reputation, and feelings, should still be compensated, above and beyond, for a wrong committed against the public at large, and that the idea is inconsistent with sound legal principles, and should never have found lodgment in the law.

16. **Criminal torts.**—Even where the principle of exemplary damages is admitted, it is held in many jurisdictions to be inapplicable to those acts causing injury which are likewise punishable by the state. Courts so holding reach this conclusion on the ground that to add punitive damages in such cases would be imposing a double punishment for the same offense, which, they hold, is not only repugnant to the common law, but also in violation of that clause

of the Constitution which provides that "no person shall be twice put in jeopardy for the same offense."[42] But however forceful the arguments against assessing of punitive damages against one where the wrong may also be punished criminally by the state, the great majority of the courts have taken the opposite view. They will not permit the fact that defendant has been, or may be, compelled to pay a fine to the state for his wrongful conduct, to shield him from punitive damages.

This double punishment is defended upon the ground that the one act was really two offenses—one against the state and the other against the individual. It is, therefore, claimed that there is only one punishment for each offense, and that for this reason the rule does not violate the Constitution, and is not repugnant to the rules of the common law relating to double punishments for a single offense.[43] On this phase of the subject there is also a conflict of authority, relating to mitigation of exemplary damages where the defendant has been criminally prosecuted.

In a few jurisdictions evidence of a previous criminal prosecution and the payment of a fine will be received for the purpose of mitigating exemplary damages.[44] But the courts generally refuse to admit such evidence for this purpose.[45]

[42] Taber v. Hutson, 5 Ind. 322; Fay v. Parker, 53 N. H. 342; Wabash Printing & Pub. Co. v. Crumrine, 123 Ind. 89; Austin et ux. v. Wilson et ux., 4 Cush. 273, LEADING ILLUSTRATIVE CASES.

[43] Roberts v. Mason, 10 O. St. 277; Brown v. Evans, 17 Fed. 912; Hendrickson v. Kingsbury, 21 Ia. 379.

[44] Sowers v. Sowers, 87 N. C. 303; Flanagan v. Womack, 54 Texas 45.

[45] Roberts v. Mason, 10 O. St. 277; Bundy v. Maginess, 76 Cal. 532; Reddin v. Gates, 52 Ia. 210.

17. **Punitive damages against principal for agent's acts.**—The authorities are in conflict on the question whether punitive damages can be awarded against the principal on account of the act of his servant or agent. In Maisenbacker v. The Society of Concordia,[46] this point was raised. The plaintiff, a young lady, alleged and proved that the defendant's floor manager appointed by the defendant, a corporation, to have charge of the dancing in a dance hall operated by the defendant, rudely and insolently placed his hand upon her shoulder while she was upon the ballroom floor, stating to her that she could not dance there and that she was an unfit person to be there.

This conduct apparently was sufficient to show that the agent's acts were malicious or wanton, and in an action against him would have justified the imposition of punitive damages. But the court, while conceding this, said it required proof of additional facts to render the principal liable for such damages for injury inflicted by its agent. It held that there must be evidence showing that the defendant adopted, approved, or directed such acts of its agent, and that however gross or culpable the agent's conduct may be, the principal may not be held for punitive damages unless he is also chargeable with gross misconduct.

It was held in Rucker v. Smoke, 37 S. C. 377, 34 Am. St. R. 758, that a principal, whether a corporation or an individual, may be held liable in exemplary damages to a third person on account

[46] 71 Conn. 369.

of a wrongful, wanton, and malicious act of his agent, done within the scope of his agency, although such act is not previously authorized or subsequently ratified by the principal. The courts of many states have adopted the rule that the principal cannot be held in punitive damages for his agent's torts, however willful they may be. They hold the principal for the agent's torts only for compensatory damages, unless he participated in the agent's wrongful act, or authorized or approved it.[47]

But many courts make a distinction between natural persons and corporations against whom it is sought to collect exemplary damages on account of their agents' torts. For instance, a court may hold that a corporation which can at no time do any act except by agents, will be liable for exemplary damages, while under similar facts a natural person would not be responsible for such damages. It is difficult to find a justification for this distinction. Since a corporation in such matters is held to be a person it should stand upon the same basis relating to liability for its servants' acts as any other person under like conditions. It seems, however, that a majority of the courts hold that corporations are responsible in punitive damages for their agents' willful torts while acting within the scope of their authority.

The agent is presumed to be a representative of the corporation in the particular act, thus making

[47] Hagan v. Providence & Worcester R. R. Co., 3 R. I. 88; Howe v. Newmarch, 12 Allen 49; Barden v. Felch, 109 Mass. 154; Mendelsohn v. Anaheim & Co., 40 Cal. 657; Pollock & Co. v. Gantt, 69 Ala. 373, 44 Am. Rep. 519; Eviston v. Kramer, 57 Wis. 570.

the corporation liable for whatever form of damages might be recoverable against the agent himself.[48] So when a passenger has been ejected from a car by a conductor in a willful or malicious manner the railway company has been required to pay the plaintiff thus ejected, punitive damages, as shown by the above cases. Other authorities hold that corporations cannot be held for punitive damages for the acts of inferior servants, unless it be shown that their acts were approved or authorized by those having the management of the corporation, such as the board of directors or the general manager.[49] The rule permitting exemplary damages to be recovered against corporations because of the acts of agents does not apply to municipal corporations. They are exempt from such damages unless made liable by statute, because of their nature. It is difficult to understand how a city could maliciously or willfully injure anyone.[50]

[48] Atlantic & G. W. Ry. Co. v. Dunn, 19 O. St. 162; Louisville and N. Ry. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600.

[49] Lakeshore & M. S. Ry. Co. v. Prentice, 147 U. S. 101; Norfolk & W. Ry. Co. v. Neely, 91 Va. 539.

[50] Chicago v. Martin, 49 Ill. 241, 95 Am. Dec. 590.

CHAPTER IV.

DIRECT AND CONSEQUENTIAL DAMAGES.

18. **Direct and indirect results in both torts and contracts.**—The fact that all the results caused by either a breach of contract or a tort cannot be traced by a court, is well settled. Damages flowing from a wrong of any kind may clearly be the result of the wrong and yet be so remote from it that they cannot be considered by the court. All damages that are direct, that is, the immediate result of the wrongful act are recoverable. Damages that are consequential, that is, that are the indirect result of the loss, are either proximate or remote. Consequential damages that are proximate to the wrongful act are recoverable, but those which are remote will not be considered. No definite rule can be stated clearly fixing the meaning of the terms "proximate" and "remote" in this connection. They are matters which must be determined in each case and the question of what damages are proximate and what remote therefore frequently arises for discussion. In Dubuque Wood & Coal Asso. v. Dubuque,[51] referring to this question, the court said: "The rule limiting the recovery to the natural and proximate consequences of the act complained of is universally admitted and the extreme difficulty in its practical application is quite as widely conceded. The dividing line between

[51] 30 Ia. 176.

proximate and remote damages is so indistinct, if not often quite invisible, that there is, on either side, a vast field of doubtful and disputed ground. In exploring this ground there is to be had but little aid from the light of adjudicated cases."

19. **Usually is question for the jury.**—The question whether or not the particular matter in controversy is a proximate result of defendant's wrongful act may sometimes be so clear that the court would be justified in so stating to the jury; but it is a question which generally is left, as a fact, for the jury to determine.[52] It was said in Fairbanks v. Kerr that many cases illustrate but none define what is a proximate and what a remote cause and that they are incapable of any strict definition which will suit in every case. It is further impossible to compensate for all losses and it is stated as the rule in many cases that the law aims at a just discrimination which will impose upon the party causing the injury the damage which a proper view of his acts and the attending circumstances dictate. This it is held presents questions of fact for a jury and not of law for the court.[53]

The line then fixed between proximate and remote damages, or turning it the other way—proximate and remote cause of damages—is drawn by the court or jury for the purpose of determining in a practical manner for what damages the defendant in the

[52] Bunting v. Hogsett, 139 Pa. St. 363.

[53] 70 Pa. St. 86, 10 Am. R. 664; Penn. R. R. Co. v. Kerr, 62 Penn. 353; Sloane v. Southern Cal. Ry. Co., 111 Cal. 668; Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 619, 48 Am. Rep. 134; Pittsburgh, etc., R. R. Co. v. Staley, 41 O. St. 118.

particular case should be held, since it is clearly impossible to trace out the ultimate effect of any wrongful act.[54] Plaintiff was a passenger on one of defendant's cars. On account of the late arrival of the train at plaintiff's destination the conductor sent her to a hotel to remain until morning at the expense of the company. The innkeeper assigned her to a room and gave her a lamp which exploded and she was severely burned. For this injury she sued the railway company, since it was on account of its fault she was in the hotel. But the court held the damage was too remote, and for this reason could not be recovered against the railway company.[55]

20. **Two classes—Tort and contract actions.**—The cases which touch upon this question are so numerous and present so many phases of the subject of damages, that only a few even of the points mentioned can be discussed here. But there may be two great divisions made, namely, actions for breach of contract and actions in tort.

The leading case of Hadley v. Baxendale established the most important rule relating to damages for breach of contract, which in substance is that the damages to be recovered for a breach of contract are those which arise, either naturally, that is, according to the usual course of things, from such breach of contract itself, or on the other hand such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach

[54] Central of Ga. Ry. v. Price, 106 Ga. 176.

[55] 43 L. R. A. 402, 32 S. E. 77; presents facts illustrating this proposition.

of it. This rule has generally been adopted by the courts.[56]

Only direct and immediate damages are recoverable under the first part of this rule. Speculative profits or remote losses are not within its meaning.[57] Thus it was held in Mitchell v. Clarke that where defendant had broken his contract with plaintiff in failing to pay a creditor of plaintiff's, money entrusted to him for that purpose, those damages resulting from the sale of plaintiff's property at a sacrifice in order to pay such debt, could not be shown.[58] Damages in this case would appear to be both speculative and remote.

Such a result did not usually and naturally flow from such a breach of contract. And so it has frequently been held that in an action for breach of contract damages arising from loss by plaintiff of a collateral contract may not be recovered unless the existence of such collateral contract was known to the defendant.[59] It is also settled that damages which are remote and speculative may not be recovered for breach of a contract. In Williamson v. Brandenburg,[60] defendant was sued for misrepresentations made in the sale of a horse to plaintiff. It was held that an allegation relating to the amount the horse would have been able to earn if he had been sound and able to trot at a specified rate of

[56] 9 Ex. 341, LEADING ILLUSTRATIVE CASES; Hopkins v. Sanford 38 Mich. 611; Billmyer v. Wagner, 91 Pa. St. 92.

[57] Hamilton v. McPherson, 28 N. Y. 72.

[58] 71 Cal. 163, 60 Am. Rep. 529.

[59] Bridges v. Stickney, 38 Me. 361; Sanderlin v. Willis, 94 Ga. 171; Wetmore v. Pattison, 45 Mich. 439.

[60] 133 Ind. 594.

speed was too remote and speculative to be considered as an element of damages.[61]

21. **Future profits.**—While future profits which are entirely speculative may not be recovered as damages for a breach of covenant, it does not follow that no future profits may be recovered. Where such profits are sufficiently certain, or where they were in the contemplation of the parties when making the contract, or where by evidence they may be shown with reasonable certainty, and their loss results from defendant's breach of contract, they may be allowed against him.

So where plaintiff had an established business from which profits in the past had been made, which was destroyed by defendant's breach of contract, the gain or profit arising from such business was proper evidence to prove what plaintiff reasonably might have made in the future, and therefore what loss defendant's breach had caused plaintiff.[62]

In Griffin v. Colver the court fully discusses the subject of profits as damages and makes the distinction accurately between profits which may be recovered and those which may not be. It is said that profits are so frequently excluded from the estimate of damages because they are so often speculative and uncertain and not because there is anything in their nature which should prevent their allowance; and that profits which would certainly have been realized but for the defendant's default are recoverable. This is only an illustration of the more general rule

[61] Hill v. Parsons, 110 Ill. 107; First Nat'l. Bank v. Thurman, 69 Ia. 693.
[62] Allison v. Chandler, 11 Mich. 542; Chapman v. Kirby, 49 Ill. 211.

that damages must be certain both in their nature and in respect to the cause from which they proceed.[63]

On this principle, the Massachusetts court held in Dennis v. Maxfield that plaintiff might recover profits which could have been made in a whaling voyage except for defendant's breach of contract.[64]

22. **Certain profits.**—Profits of a contract which certainly would have been made, embraced in the contract itself, are always elements of damages for a breach of the contract. Where a contract with plaintiff to do a certain piece of work or to erect a certain building has been broken, plaintiff will recover the profits he would have made had the contract not been broken.[65] So it has been held that one partner may recover of another, who has broken a partnership contract, prospective profits of the partnership business.[66] But the second part of the rule given in Hadley v. Baxendale,[67] supra, covers many cases not included in the first portion of the rule, namely, that such damages may be recovered as may be reasonably supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it. So in Fox v. Boston & Maine Railroad,[68] the defendant was held responsible for loss sustained by plaintiff on account of apples freezing while being carried

[63] 16 N. Y. 489.

[64] 10 Allen 138 (Mass.).

[65] Dibol v. Minott, 9 Ia. 403; Brown v. Hadley, 43 Kan. 267; Lee v. Briggs, 99 Mich. 487.

[66] Bagley v. Smith, 19 How. Prac. 1; Hunt v. Reilly, 50 Tex. 99.

[67] 9 Ex. 341, 23 L. J. Ex. 179, LEADING ILLUSTRATIVE CASES.

[68] 148 Mass. 220.

by defendant, under a special contract to carry them at a particular time. Under the general rule applicable to carriers for delay in carrying goods, defendant would not have been responsible for the loss caused by freezing; but the court held the carrier liable here because the parties, at the time they made the contract, had in contemplation the danger which would result from a delay in shipping the fruit.

This principle applies to loss of profits. In Adams Express Co. v. Egbert,[69] plaintiff had delivered to defendant a box containing plans and specifications to be forwarded to a committee who had offered a premium of five hundred dollars to the successful competitor for the best plans for a certain building. On account of the delay by the company in delivering the plans plaintiff was prevented from competing with others. The company had knowledge on accepting the box of what it contained and of plaintiff's purpose in sending it, and of the time when it must have been delivered in order to be considered with the plans of others. Plaintiff claimed damages on account of loss of an opportunity to compete for the premium. The court held that this privilege was the main thing inducing plaintiff to contract with defendant to carry his plans, and that damages for its loss were therefore in contemplation of the parties as a result of the breach of contract, and that the loss of the opportunity to compete for the prize is not too remote to be considered. The court held, however, that plaintiff failed to prove any loss in this regard, as no evidence was offered showing that

[69] 36 Pa. St. 360, 78 Am. Dec. 382.

the prize would have been awarded to him, even had defendant fulfilled its contract.

23. **Where profits are part of the contract.**—It has frequently been held that profits may be recovered where they are part and parcel of the contract itself, entering into and constituting a portion of its very elements.[70]

So in McHose v. Fulmer,[71] the general rule for the measure of damages when a vendor fails to comply with his contract was stated to be the difference between the market price and the contract price of the article at the time and place of the breach. But the court held that where, as in that case, one purchased iron to be used in a certain manner and then to be sold again, and where because of defendant's failure to furnish the iron under his contract plaintiff had lost contracts with other parties because such iron as defendant had contracted to furnish could not be secured elsewhere, defendant was responsible for plaintiff's loss of profits which he would have made in such collateral contracts.

24. **Consequences flowing from torts.**—While in torts as in contracts, only those consequential damages which are proximate may be recovered against defendant for his wrongful act, yet the field in torts is of much broader scope.

There are some expressions to be found in the decisions indicating that in actions for negligent torts only such damages may be recovered as the defendant at the time of committing the tort sup-

[70] Pennypacker v. Jones, 106 Pa. St. 237.
[71] 73 Pa. St. 365.

posed might result from his act. This is clearly not the rule which governs the measure of damages in such cases, and should never be applied, whether the tort is willful or only negligent. On the other hand, all damages which result naturally from a wrongful act by defendant, are properly chargeable to him, and it is immaterial whether the particular consequences of his act could have been foreseen or were contemplated by the wrongdoer.[72]

25. **Consequences foreseen.**—The court in Miller v. Railroad Co. states a rule which is frequently found in other jurisdictions and is often quoted as being the general rule relating to the measure of damages in actions for tort; namely, that a defendant in an action for negligence can be held to respond in damages only for such consequences as, under the surrounding circumstances of the particular case, might and should have been foreseen or anticipated by the defendant as likely to result from his negligent act. As thus stated, the rule is quite similar to that given above which applies to the measure of damages in actions for breach of contract.[73]

From an examination of the cases it is difficult to determine whether the courts adopting this rule mean to indicate that it is intended to limit the recovery of damages in actions for negligent torts only to the results which the wrongdoer might have foreseen or contemplated, as in case of breach of contract, or whether in the use of these words it is intended to cover the same scope of meaning as when

[72] Sloan v. Edwards, 61 Md. 89.
[73] 78 O. St. 309.

the words, "natural and probable results," are used. It is certain that in cases of tort the defendant often is, and certainly should be, held for those consequences of his act which he at the time neither foresaw nor had in contemplation.

In Vosburg v. Putney,[74] defendant, a boy eleven years old, sat in school opposite plaintiff, a boy of fourteen. Defendant reached across the aisle and touched plaintiff lightly on the leg with the toe of his shoe. Plaintiff did not feel the touch at the time, but presently felt at that point a violent pain. The next day he was ill as a result of the severe pain which continued. Later he became so ill that a physician was called in, but notwithstanding the treatment he continually grew worse until finally he lost the use of his leg. The theory of the defense was that plaintiff could recover only such damages as defendant might reasonably be supposed to have contemplated, at the time of the touching, as likely to result therefrom. But the court said that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him.

And in Guille v. Swan, where the defendant was held responsible for injury done plaintiff's premises by a crowd coming thereon, attracted by defendant's having alighted there from a balloon, the court said: "The intent with which an act is done is by no means the test of the liability of a party to an action of trespass."[75]

[74] 80 Wis. 523.
[75] 19 Johns. 381.

26. **Same subject continued.**—It is said in Ehrgott v. Mayor of New York that the best statement of a rule in such matters is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct, and what are such consequences must generally be left for the determination of a jury.[76]

A clear distinction is shown between the rule which governs in actions on contracts and in torts. The court asserted that in the case before it, nothing short of Omniscience could have foreseen the result; and an instruction stating that defendant was liable only for such damages as might reasonably be supposed to have been in the contemplation of defendant at the time, was refused. It would seem then that whether defendant foresaw or might reasonably have foreseen the results of his wrongful act is not a proper test of his liability for its results, but that if those results are the natural and proximate consequences of his act he will be held responsible for them, whether he could reasonably have foreseen them or not.

The fact that plaintiff's physical or mental condition was such at the time of defendant's wrong as would more readily cause injury by defendant's act may not be shown in excuse or mitigation of damages, as this would not reduce defendant's wrong.

That the injured person was in a feeble state of health or was more susceptible to disease or injury than the average person and that the defendant at the time of the wrong was ignorant of such facts, is

[76] 96 N. Y. 264.

immaterial and may not be proven in defense of the wrong.[77]

27. **Unlawful acts of defendant.**—Some courts have apparently imposed on defendant liability for results of his acts when they were in themselves unlawful consequences which would under other circumstances have been held too remote to be considered by the jury in assessing damages. In Salisburg v. Hirchenroder the court held defendant responsible for the injuries caused by a falling sign because the act of keeping it where it was, the court said, was illegal, whereas if the act had been only negligent, it was stated defendant would have been excusable under the circumstances.[78] But it would seem that in this regard the same rule should be applied as where defendant's act was negligent only. The question here should be whether the result is the direct or proximate result of defendant's act and if it is not defendant should not be held responsible.

It was held in Renner v. Canfield that the shooting of a dog on the highway by defendant could not be held to be the proximate cause of the illness of a woman, who was shocked by the report, although the shooting was unlawful. It was said that the results to her would have been the same whether killing the dog was lawful or unlawful.[79]

[77] Brown v. Chicago M. & St. P. Ry. Co., 54 Wis. 342, 41 Am. Rep. 41; Tice v. Munn, 94 N. Y. 621; Louisville, etc., Ry. Co. v. Falvey, 104 Ind. 409.

[78] 106 Mass. 458, 8 Am. Rep. 354.

[79] 36 Minn. 90, 1 Am. St. Rep. 654.

CHAPTER V.

ENTIRE DAMAGES IN ONE ACTION.

28. **General rule.**—The authorities are uniform in holding that where there is but one cause of action all damages must be recovered in a single suit, and although fresh damages may later result from the original wrong a second action cannot be maintained. This rule applies alike to actions in tort and in contract. In tort if the injury inflicted terminates with the wrongful act itself, but one action can be sustained, although unforeseen damages later appear, as in case of assault and battery. Here the act and injury are simultaneous. The wrong is at once complete. But from a blow on the head the full effect may not appear or become known for a long period thereafter.

If damages have once been assessed in an action, covering only the results then apparent, or those which, as shown by expert testimony, will probably later appear, and then at a subsequent period, much more serious results than had been anticipated, do appear, action therefor is barred by the former judgment. This question arose in the early case of Fetter v. Beale.[80]

In an action which was for a battery plaintiff alleges that he had previously recovered for it £11 and no more, and that after that recovery, part

[80] King's Bench 1 Ld. Raym. 339, 692.

of his skull came out of his head, for which latter damages he now sues. The defendant pleaded the former recovery in bar. The court held for the defendant on the ground that there was but one cause of action, which was the battery, and that whatever consequences it may have produced are only matters of aggravation of damages in the one action.[81]

29. **Question arises in different ways.**—The question may be raised in the pleadings where plaintiff asks to recover for future damages, or when evidence is presented to show damages beyond the date of the trial. This, plaintiff may and should do if it is certain that there can be no future cause of action resulting; but of course if he may sue for future damages as they arise, he may then only recover for those which existed at the time of filing his action. So the question may be raised by pleading the Statute of Limitations. If plaintiff's cause of action arose at the time of the wrongful act complained of, then the statute at that time began to run against the whole cause of action, provided it is not divisible; and in such case if a time equal to the period mentioned in the statute has elapsed from the date of the wrongful act, the statute may be successfully pleaded although the damages for which the action is brought may have recently arisen.[82]

In National Copper Mining Co. v. Minnesota Mining Co., referring to this point, the court said: "If plaintiff had brought suit more than two (2) years after the original trespass, and before the flooding

[81] Howell v. Goodrich, 69 Ill. 556.

[82] Williams v. Pomeroy Coal Co., 37 O. St. 583, LEADING ILLUSTRATIVE CASES.

of its mine by water flowing through the opening had begun, and if the Statute of Limitations had been pleaded, there could have been no recovery. The action for the original wrong would then have been barred, if there had been no repetition of the injury in the meantime to give a new cause of action. The mere continuing of the opening in the wall could not be a continuous trespass."[83]

The question may also be raised by pleading former adjudication, if damages, however small, have in a former action been recovered for the wrong complained of. Therefore the question whether entire damages must be recovered in a single action is so important to the litigant that it is greatly to be regretted that the authorities on the point are in conflict.

30. **Conflicting views.**—This conflict may most readily be shown by the presentation of some of the leading cases on the subject.

In Mitchell v. Darley Main Colliery Co., plaintiff was the owner of the surface of the land and defendant was lessee of the coal seams under the surface, which it had excavated prior to 1868. At the time of excavating, there was a subsidence of plaintiff's land for which defendant acknowledged liability and compensated plaintiff. Subsequent to 1868 the adjoining landowner excavated the coal on his land, as he was legally entitled to do, but it resulted in other subsidences of plaintiff's land attributable to the fault of defendant in not leaving sufficient support under plaintiff's land. The ques-

[83] 57 Mich. 83.

tion is thus presented whether in settling for the first subsidence all damages were thereby included which sprang from defendant's taking away its coal. The court held that each subsidence gave a new cause of action to plaintiff without any new act of injury on the part of defendant, and therefore plaintiff could sustain his action. This case has frequently been approved and followed.[84]

On the other hand, a contrary doctrine is maintained in Williams v. Pomeroy Coal Co.[85] The defendant, the Pomeroy Coal Co., was the lessee of and had the right to mine the coal from a lot adjoining that of plaintiff, which it did in 1862, but in doing so it excavated a portion of plaintiff's coal by mining on plaintiff's lot a distance of thirty-nine feet. In 1868 while plaintiff was mining on his own lot his workman tapped the point where defendant had wrongfully mined on plaintiff's lot, letting the accumulated water into plaintiff's lot, thus flooding his mine. The question here, as in the English case, supra, is, What constituted the cause of action and when did it accrue?

Plaintiff insisted that the cause of action was the flowing of the water into his mine and that it arose at that time. But the court held that the original trespass constituted the cause of action, and that the flooding of plaintiff's mine was only a portion of the damage resulting from the trespass; that the wrong was completed when the trespass occurred; that the Statute of Limitations then began to run, and that

[84] L. R. 14 Q. B. Div. 125.
[85] 37 O. St. 583.

since the period mentioned in the statute, applying to trespass, had expired, plaintiff could not now maintain this action although the damages had recently arisen.

31. **Duty when subjacent support removed.**—The leading case of National Copper Co. v. Minnesota Mining Co. presents facts quite similar to those given in the Pomeroy Coal Co. case and was decided the same way.[86] It is submitted that these cases are in conflict. The contrary has been maintained and the theory that in the two American cases defendant wrongfully trespassed upon plaintiff's property, whereas in the English case no trespass could be chargeable to defendant.

But since subjacent support is a property right of which no one may rightfully deprive the owner, and since by taking away his coal without giving to plaintiff's surface proper support defendant trespassed upon the rights of plaintiff at that time, there seems to be no difference in principle between these cases, although the decisions are diametrically opposite to each other. The rule for which they stand and on which they should have united is that, in case of trespass, immediate damage results, and an action at once accrues to plaintiff in which entire damages, present and future, may, and therefore must, be recovered, if recovered at all. It is true that it may be difficult at the time of the trespass to anticipate and prove what damages may arise in the future, but this difficulty in establishing a fact cannot change the rule of law.

[86] 57 Mich. 83, 58 Am. Rep. 333.

32. **When damages recoverable in one action only.** —It must be evident, however, that in some acts of trespass a right of action may arise long after the trespass is committed and that a Statute of Limitations which might be successfully pleaded to the original act could not be so pleaded to this new element of damages. In other words, the right to sue for this class of trespasses continues so long as damages continue to arise therefrom. Evidently those mentioned in the foregoing cases do not fall within this class. We may say from the decisions in these and like cases, that when the act of the wrongdoer consists in a trespass which results in depriving plaintiff of a portion of his property that has been taken by defendant, or in simply injuring plaintiff's property by doing some wrong by which the injury is entire and complete when the wrong is done, such as digging into his mine, cutting and carrying away his timber, breaking in his doors or windows, injuring his fruit trees, or breaking down his shrubbery, then one action alone is given to plaintiff for such a trespass and that it arises at once when the act of trespass is committed. The injury and the damage, both of which are required to produce a cause of action, concur at this moment of time. And since damage alone without injury, like injury without damage, will not give rise to a cause of action, any new damage thereafter resulting cannot be recovered, after one adjudication of, or settlement for, the original trespass, because plaintiff's entire claim is merged in the former judgment or settlement.

So it was held in Clegg v. Dearden, Lloyd v. Wigney, Kansas Pac. Railway Co. v. Mihlman.[87]

The first recovery or adjudication is a complete bar to an action for future damages. In the Kansas Pacific Railway case, supra, the court said: "Where the original act is unlawful and an invasion of plaintiff's rights, the cause of action dates from the act, and a new cause does not arise from new damages resulting therefrom." In this case defendant had wrongfully entered upon plaintiff's land and had dug a ditch thereon, which was an injury to the land, and the court held that all the wrong was complete when the ditch was dug, and that there could be no legal duty devolving upon defendant to re-enter plaintiff's land and fill up the ditch.

33. **When more than one action.**—Cases of this character are to be distinguished from those where the trespass itself does not terminate the wrong, but where the injury continues from day to day or from time to time so long as it remains the duty of the defendant to discontinue the cause of the injury. Such acts readily fall into two classes: one where defendant's original act is not a trespass upon plaintiff's property, being in itself legal, but which results from time to time in injury to plaintiff. As, placing a drain on one's own land in such a manner that water will, from time to time, be cast upon another's land; or using machinery or a building on land of one's own in such a way as to injure plaintiff.

The other class consists of those acts which are

[87] Clegg v. Dearden, 12 Q. B. 576; Lloyd v. Wigney, 6 Bing. 489; Kansas Pac. Ry. Co. v. Mihlman, 17 Kans. 224.

wrong in themselves and result in a continuing wrong to another, such as the erection of a building or structure on another's land without his consent. The wrong continues so long as the structure remains, and the damage also being continuous, rights of action are continually arising; and the fact that one judgment has been taken against defendant, is no bar to future actions for future damages. The law imposes upon the defendant the duty to remove from plaintiff's land the obstruction he placed there and so long as this duty remains, responsibility for failure to perform it continues.

This question was before the court in Holmes v. Wilson.[88] There it was shown that the defendants, trustees of a turnpike company, had built buttresses on plaintiff's land, and for this, in an action of trespass, he recovered damages, and then gave defendants notice to remove the buttresses, which they failed to do. A second action was begun, to which the former action was pleaded in bar. But it was held that this was not a bar, and that the buttresses constituted a continuing trespass giving rise to repeated causes of action. The plaintiff in such cases finds that his right to exclusive possession of his property is continually invaded by the structure of defendants, and that his rights therein are thus daily limited by a new wrong, which defendants should and may any time in the future terminate. The legal obligation to discontinue a trespass or to remove a nuisance always rests upon the one guilty of these wrongful acts, and no good reason can be found why,

[88] 10 A. & E. 503, LEADING ILLUSTRATIVE CASES.

if he fail to do so, he should not repeatedly be held for his continued wrong.

34. **Same subject—Rule stated.**—In National Copper Co. v. Minnesota Mining Co.,[89] supra, the following rule of distinction between the cases was approved: "Where the plaintiff complains of a trespass, the statute runs from the time the trespass was committed, except in the case of a continuing trespass. But where the cause of action is not in itself a trespass, as an act done upon a man's own land, and the cause of action is the consequential injury to the plaintiff, there the period of limitation runs from the time the damage is done."

The theory which would prohibit the bringing of more than one action for such a continuing trespass as the erection of a structure on another's land, would result in granting to the intruder the privilege forever of continuing such structure by means of this action in trespass. In Holmes v. Wilson,[90] supra, Patterson, J., said: "How can you convert a recovery and payment of damages for the trespass into a purchase?" And in response to the argument of counsel that a former judgment for damages operated as a purchase of land, he said: "As to the supposed effect of the judgment in changing the title to land, the consequences of that doctrine would be, that a person who wants his neighbor's land might always buy it against his will, paying only such purchase money as a jury might assess for damages up to the time of action." And this doctrine

[89] 57 Mich. 83, 58 Am. Rep. 333.
[90] 10 A. & E. 503, LEADING ILLUSTRATIVE CASES.

the court repudiated, holding that each fresh injury to land, such as a continuing trespass, gives rise to a new cause of action.

35. **Same subject—Buildings erected on another's land.**—In Esty v. Baker the court held that the continuance of a building on another's land is a trespass for which damages may be recovered, even though damages had already been recovered for the trespass in erecting the building.[91] So in Russell v. Brown, defendant had erected a wall nine inches wide and one hundred and six feet long on the land of plaintiff; and plaintiff recovered damages for its erection there. Later he again sued defendant for its continuance and the court held that the mere continuance of a structure wrongfully erected on the land of another, even after damages had once been paid for the original trespass in building the structure, was a continuing trespass for which damages could again be recovered, and that such judgment for damages does not operate as a purchase of a right to continue the structure.[92] The same rule was affirmed in Thompson v. Morris Canal and Banking Co.[93]

36. **Theory of temporary or permanent nuisance.**—All the courts do not approve the foregoing doctrines. It is sometimes contended that the line of distinction should be made to depend upon whether the act causing the injury has resulted in some per-

[91] 48 Me. 495.

[92] 63 Me. 203.

[93] 17 N. J. L. 480; Thayer v. Brooks, 17 O. 489; Anderson, etc., R. Co. v. Kernodle, 54 Ind. 314; Harrington v. St. P. & Sioux City R. R. Co., 17 Minn. 215; Uline v. N. Y. C. & H. R. R. R. Co., 101 N. Y. 98.

manent structure, or that only which is temporary. If the latter, then damages are recoverable only to the date of filing the action; but if a permanent structure has been wrongfully erected, then all future damages may be recovered in one action.[94] In Joseph Schlitz Brewing Co. v. Compton,[95] the distinction here mentioned is discussed. The court said: "There is much confusion among the authorities which attempt to distinguish between cases where successive actions lie and those in which only one action may be brought. The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land and is at the same time a nuisance or trespass." The court then indicates the two classes of decisions, stating that one class goes upon the theory that a nuisance or trespass is not in its nature permanent and will not continue forever and therefore these courts refuse to give entire damages in one action; while the other class of cases holds that the entire controversy should be settled in a single action and damages allowed for all injuries, past and future, if such trespass be proven with reasonable certainty to be permanent. The court then states that the better view is presented in the former class of cases, which seems to be the correct view, and sustained by the better reasoning and the weight of authority.

37. **Entire damages in contract actions.**—In case of a breach of a single indivisible contract but one action can be maintained. If all damages are not

[94] North Vernon v. Voegler, 103 Ind. 314.
[95] 142 Ill. 511.

then recovered they are lost to the plaintiff. So if A should employ B for a period of one year at twelve hundred dollars a year and should at the end of the first month of his employment wrongfully discharge him, B would have a right of action against him at once. But in such case he could only recover the damages sustained up to the time of filing his action, and having once recovered damages for A's breach of contract he could never maintain another action for additional damages, for failure to secure employment during the remainder of the year. The rule is well established that a recovery for part of an entire demand merges the whole of it and bars any further recovery thereon.[96]

A contract is said to be severable or divisible in cases where the price is fixed separately for each item of purchase. Or, if the acts to be performed are fixed for different periods of time, this is said to make the contract divisible.[97] If it appears from the contract that its entire performance is not a condition precedent to receiving pay for portions of the work already done it is said to be divisible.[98] To determine whether or not entire damages, past and future, may be recovered in one action for breach of contract, it is important first to determine whether there has been such a breach of the contract as would authorize the plaintiff to treat it as putting an end to the contract.

[96] Bendernagle v. Cocks, 19 Wendell 207 (N. Y.); Erwin v. Lynn, 16 O. St. 539; Oliver v. Holt, 11 Ala. 574; Logan v. Caffrey, 30 Pa. St. 196.

[97] Quigley v. De Haas, 82 Pa. St. 267; More v. Bonnet, 40 Cal. 251; Leonard v. Dyer, 26 Conn. 172.

[98] Siegel Cooper Co. v. Easton, etc., Co., 165 Ill. 550; Jackson v. Cleveland, 15 Wis. 107.

The question frequently arises in continuing contracts where one has agreed to support another during his life for a period of years. Thus the court said in Remelee v. Hall:[99] "If the defendant should wholly and absolutely refuse to keep the plaintiff for a long period of time, and compel him to furnish a house and maintenance for himself, with notice that the defendant did not intend further to perform the contract on his part, or if he should grossly and wantonly ill treat the plaintiff, so that he could no longer live quietly and comfortably with the defendant, we think such a breach might well be regarded as entire, and justify a recovery of damages for the full term of the contract." And in Parker v. Russell,[1] an action for breach of contract to support the plaintiff during his life, it was said that if the contract is regarded as still subsisting the damages may be assessed up to the time the action was begun, but if the breach is such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant and he elects so to treat it, the damages may be assessed as of a total breach of an entire contract. It is evident in such cases that the court must be governed by the facts of each case, and thus it is difficult to announce general rules to govern them.

38. **Divisible contracts.**—If, however, a contract is divisible in its terms, more than one action may be sustained for its breach. Thus if plaintiff's employment was for a year but payment was to be made

[99] 31 Vt. 582, 76 Am. Dec. 140.
[1] 133 Mass. 74.

monthly, if defendant wrongfully terminated the contract at the beginning of the year, plaintiff might maintain an action as often as the installments for his pay fell due. These divisible contracts usually contain a number of promises to do a number of acts, all constituting one transaction. A breach of one such promise is not necessarily a breach of the entire contract. So where there is a purchase at one time of several articles of different kinds and at different prices, a refusal to take and pay for one would be a breach only of that portion of the contract, and as many actions might be brought as there were breaches of these several parts of such a contract.

CHAPTER VI.

MENTAL SUFFERING AND FRIGHT.

39. **Kinds of mental suffering.**—There are so many forms of mental suffering that it will be possible to mention and discuss briefly only a few of them in connection with the subject of damages, such as fright, humiliation, indignity, shame, mortification, anxiety, and distress.

For mental suffering alone, caused by an act not itself illegal, and where there is no physical impact or other violation of one's legal rights, there can be no recovery. On this the authorities are unanimous. Since mental suffering always arises from, and is connected with, some overt act, the courts have generally dealt with the act as the principal thing and the resulting suffering as incidental and of secondary importance. But as a matter of fact, it has frequently occurred that the most important element forming the injury for which damages are recovered is the mental suffering, and the act or omission has often only constituted the peg on which damages for mental suffering were hung.

40. **Failure to deliver message.**—The cases holding that recovery may be had for mental suffering where a telegraph company has failed to deliver a message, which failure would naturally produce mental anguish, are illustrations of this. The failure to deliver the message may be treated as a breach of

contract or perhaps as a tort, either of which in itself is not a grave matter and would ordinarily produce little more than nominal damages. But a cause of action is thus given, and if to this cause of action may be added damages for the mental suffering produced, an important verdict is likely to be returned by a jury. But the great majority of courts hold that even with the existence of a right of action for failure to deliver a telegram, there may not be added to this cause of action damages for mental suffering either by the one sending or the person to whom the telegram was directed, because of the failure to deliver it.[2]

41. **Mental suffering connected with actionable wrong.**—In other matters courts have frequently held that where plaintiff could establish a cause of action with which mental suffering was connected or which arose from the act constituting the cause of action, damages for mental suffering could be recovered. Thus in Meagher v. Driscoll,[3] plaintiff proved that defendant had wrongfully removed the remains of plaintiff's deceased child from his burial lot. The court held that the natural injury to plaintiff's feelings might be taken into consideration by the jury in estimating damages against defendant. The trespass was in itself an actionable tort and to the damages in this action, the court said, should be added the injury to plaintiff's feelings, even though

[2] Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, permitting recovery of damages for mental suffering because of defendant's failure to deliver a telegram, and Western Union Tel Co. v. Rogers, 68 Miss. 748, refusing such recovery, strongly present the conflicting views on this subject.

[3] 99 Mass. 281.

the injury done to the property was comparatively trifling. So in Merest v. Harvey,[4] the court sustained a verdict against defendant for £500 for trespassing upon plaintiff's premises and using insulting and abusive language toward plaintiff, although no perceptible injury was done to the land.

While the rule permitting exemplary damages was applicable here and might have justified so large a verdict the court evidently sustained it also on the theory that plaintiff was entitled, in connection with his cause of action for trespass, to recover for indignity and injured feelings.[5]

42. **May be proper in actions on contract.**—The cause of action in which damages for mental suffering may be proven may arise in contract as well as in tort, although in most cases for breach of contract evidence of mental suffering will not be admitted. But in an action for breach of marriage contract, mental suffering of plaintiff may be proven and considered by the jury.

Referring to the principle on which the cases are based which do permit evidence of mental anguish in actions ex contractu, the court in Renihan v. Wright[6] said: "The cases rest upon the reasonable doctrine that where a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character, in the

[4] 5 Taunt. 442.
[5] Vogel v. McAuliffe, 18 R. I. 791, 31 Atl. Rep. 1.
[6] 125 Ind. 536.

event such damages accrue by reason of a breach of contract on his part."[7]

43. **Recovery in cases of injury without personal impact.**—Evidence of mental anguish has always been held admissible in cases of assault or false imprisonment, even though there was no touching of plaintiff by defendant and no physical injury resulting from the wrong, because the tort was actionable in itself.[8] This rule applies to all actionable wrongs.

Where a willful wrong which is not in itself actionable, produces fright or mental anguish which results in physical injury to plaintiff, damages may be recovered which include those for mental anguish. Wilkinson v. Downton (1897)[9] is a good illustrative case. Plaintiff's husband, on the day of the injury complained of, had gone to a race-meeting. In the evening defendant went to plaintiff's house and, by way of a practical joke, informed her that her husband had met with a serious accident whereby both his legs were broken.

The statement was false, but plaintiff believed it to be true, with the result that she thereby received a severe nervous shock, from which she became seriously ill and suffered great mental anguish for many weeks. The court permitted evidence of her mental suffering to be considered by the jury and a verdict for £100 was given as compensation for plaintiff's illness and suffering. It was insisted that since

[7] Parker v. Forehand, 99 Ga. 743; Robinson v. Craver, 88 Ga. 381; Kurtz v. Frank, 76 Ind. 594, LEADING ILLUSTRATIVE CASES.

[8] Kline v. Kline, 158 Ind. 602; Kead v. Garrison, 13 O. C. C. Rep. 447; Gibney v. Lewis, 68 Conn. 392.

[9] 2 Q. B. 57, LEADING ILLUSTRATIVE CASES.

the practical joke was not in itself an actionable wrong there was nothing on which the claim for mental anguish could be based. But the court permitted the verdict to stand, on the ground that where fright results in physical injury such as here shown this in itself constitutes a good cause of action.

While upon this proposition there is great conflict of authority, and in point of number perhaps a majority of the courts hold a view contrary to the rule for which this case stands, yet it is difficult to discover a distinction in principle between those cases where injury is inflicted through physical agencies, or in connection with slight physical impact, and physical injury on the other hand which results from a mental shock as a result of fright or other nervous disturbance. Indeed, the better reasoning is found in the cases which hold that where a physical injury results from a fright or mental disturbance, caused by the wrongful act of another, whether done willfully or only negligently, the injured person may recover compensation for the damages thus sustained.[10]

44. **Same subject—The public policy view.**—Numerous authorities can be cited on the other side of this question. A sufficient list of them may be found in the case of Miller v. Railroad Co.,[11] where the question is fully discussed, and where the court holds that no liability exists for acts of negligence

[10] Purcell v. St. Paul City Ry. Co., 48 Minn. 134; Mack v. South Bound R. R. Co., 52 S. C. 323, 68 Am. St. Rep. 913; Sloane v. Southern Cal. Ry. Co., 111 Cal. 668; Bell v. Railway, 26 L. R. 428; Fitzpatrick v. Railway U. C. C. B. 645; Gulf, C. & S. F. Ry. Co. v. Hayter, 93 Texas 239, 77 Am. St. Rep. 856.

[11] 78 O. St. 309.

causing mere fright or shock unaccompanied by physical injury, even though severe illness results. The reasons given for this holding are the usual ones found in the decisions sustaining this view, namely, that to hold otherwise would be against public policy, in that it would tend to open up a flood of litigation consisting of feigned injuries and speculative damages resting on mere conjecture.[12] The court does not inform us why mental suffering, pain and anguish could not as readily be feigned where in connection therewith there was a slight physical injury, or an assault without impact, a libel or slander, or even a trespass upon property, in each of which cases damages for mental anguish are always provable; nor why in such cases the damages for pain and anguish are not speculative in the same degree as in the case before the court.

In Honicins v. Boston Elevated Ry.[13] it was shown that plaintiff was in one of defendant's cars when a collision occurred throwing plaintiff against a seat, she receiving only a slight blow, and no perceptible physical injury. But she had a nervous shock which was followed by suffering of a hysterical nature and the principal question was whether damages could be recovered for this mental suffering. Chief Justice Holmes, in rendering the decision sustaining such recovery, said that it is an arbitrary exception based upon a notion of what is practicable, that prevents a recovery for physical illness resulting from nervous shock alone. He further said: "Recogniz-

[12] Mitchell v. Rochester Ry. Co., 151 N. Y. 107.
[13] 180 Mass. 456.

ing, as we must, the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think when the reality of the cause is guaranteed by proof of a substantial battery of the person, there is no occasion to press further the exception to general rules." Logically, then, damages might be given, even where there is no impact.

45. **Negligence and willfulness.**—Courts make a distinction between those cases where fright resulting in bodily injury arises only from negligence, and those where the same results follow a willful act. So in Prieser v. Wielandt, defendant was held for damages in wrongfully tearing down a tenant's dwelling, resulting in fright to the wife, causing a miscarriage from which she died.[14] In Williams v. Underhill defendant was held for damages in causing fright by an assault which resulted in illness and insanity, although there was no physical impact.[15]

In Spade v. Lynn & B. R. Co., it was held in denying recovery that damages could have been allowed if defendant's act had been willful. The court said: "The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent, bound to anticipate and guard against fright and the consequences of fright. * * * It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of

[14] 48 App. Div. 569, 62 N. Y. Supp. 890.
[15] 63 App. Div. 223, 71 N. Y. Supp. 291.

seduction, slander, malicious prosecution, or arrest, and some others."[16]

In Brownback v. Fraily, where plaintiff was assaulted by defendant flourishing a whip, and addressing abusive language to her, recovery was permitted.[17] So where defendant pointed a pistol at plaintiff, threatening to shoot her,[18] and so where one stealthily entered the house in the night time, and took property belonging to the husband, thus frightening the wife, damages for mental suffering were allowed.[19] In Huston v. Freemansburg, no recovery was allowed for fright alone caused by a negligent act.[20] But in Ewing v. P. C. C. & St. L. Ry., throwing cars against plaintiff's dwelling, inducing permanent disability by fright only, was held to be sufficient cause for the recovery of damages.[21]

In Mitchell v. Rochester R. Co., the court said: "Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity or even miscarriage in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury; if not, then there

[16] 168 Mass. 285, 60 Am. St. Rep. 393-397.
[17] 78 Ill. App. 262.
[18] Hickey v. Welch, 91 Mo. App. 4.
[19] Watson v. Dilts, 116 Ia. 249, 57 L. R. A. 559, 93 Am. St. Rep. 239.
[20] 212 Pa. St. 548, 3 L. R. A. (N. S.) 49.
[21] 147 Pa. St. 40, 30 Am. St. Rep. 709.

can be no recovery, no matter how grave or serious the consequences."[22]

It is doubtful whether a distinction relating to recovery for mental suffering should be made between willful acts and merely negligent acts, as in either case plaintiff's injuries are the same, and it would seem that recovery should not be made to depend upon defendant's motive or mental attitude.

Below are given cases where damages are allowed for failure to deliver a telegram because defendant thereby broke the contract to deliver promptly. In such cases it is held that evidence of mental suffering may be introduced for the purpose of enhancing the damages.[23]

46. **Physical injury resulting from fright.**—The objections to recovery when fright or mental suffering results in physical injury, such as apoplexy, nervous prostration, paralysis, or miscarriage, seem to be illogical and unsound. But though the weight of

[22] See the criticism on this opinion in Dulieu v. White & Sons (1901) 2 K. B. 669. The doctrine is sustained in St. Louis I. M. & S. R. Co. v. Bragg, 69 Ark. 402, 86 Am. St. Rep. 206; Strange v. Mo. Pac. R. Co., 61 Mo. App. 586; Spade v. Lynn & B. R. R. Co., 168 Mass. 285, 38 L. R. A. 512, 60 Am. Rep. 393; Trigg v. St. Louis, K. C. & N. R. Co., 74 Mo. 147, 41 Am. St. Rep. 305.

[23] This seems to be the law in: Alabama—Western U. Tel. Co. v. Crocker, 135 Ala. 492, 33 So. 45; Arkansas—Western U. Tel. Co. v. Hollingsworth, 83 Ark. 39, 119 Am. St. Rep. 105; Iowa—Cowan v. Western U. Tel. Co., 122 Ia. 379, 101 Am. St. Rep. 268; Kentucky—W. U. Tel. Co. v. Van Cleave, 107 Ky. 464, 92 Am. St. Rep. 366; Mississippi—Magouirk v. West. U. Tel. Co., 79 Miss. 632, 89 Am. St. Rep. 663; Nevada—Barnes v. W. U. Tel. Co., 27 Nev. 438, 103 Am. St. Rep. 776; N. Carolina—Battle v. W. U. Tel. Co., 151 N. C. 629, 66 S. E. 661; S. Carolina—Brown v. W. U. Tel Co., 85 S. C. 495; Tennessee—Wadsworth v. W. U. Tel. Co., 86 Tenn. 695, 6 Am. St. Rep. 86; Texas—W. U. Tel. Co. v. Cooper, 71 Tex. 507, 10 Am. St. Rep. 772.

In the other states where the question has been litigated the decisions are the other way, holding that mental suffering is not ground for damages.

authority in the past is against recovery in such cases the present tendency of the courts is toward giving just compensation for such results.

Basing their argument on the rule that there can be no recovery for fright or mental suffering alone, courts have decided therefore that no liability follows from any of their results, however serious they may be. But while it may well be held that no recovery can be had for mental suffering alone because of the speculative character of the injury, the uncertainty of the proof, and the fact that it may too readily be simulated, and fraud thereby be imposed, it does not logically follow that when all these elements are removed by a physical injury, obvious to everyone, including court and jury, the same rule should be applied.

On the other hand, it would appear that when the physical injury can be as certainly traced to defendant's wrong in these cases, as in many others, wherein the courts uniformly allow damages, there should be no difference in the law relating to them.[24] The same rules of evidence apply and the same conditions precedent to recovery should be imposed; that is, that there must be proof of defendant's negligent wrong resulting in physical injury to plaintiff. When this is done, however difficult it may have been to do it, there seems only flimsy excuse in withholding just compensation for the established cause of action.

47. **Evasion of the rule.**—To obviate this apparent injustice some courts have sought, while re-

[24] Sloane v. Southern Cal. R. R. Co., 111 Cal. 668, 32 L. R. A. 193.

maining within the doctrine of former rulings, to find a way to hold defendant liable. It was held in Consolidated Traction Co. v. Lamberson that plaintiff could recover, on evidence showing that the wagon in which he was driving was struck by a car, on the theory that striking the wagon was to him a personal injury, although there was no physical impact or bodily injury proven except from fright.[25] In Buchanan v. West Jersey R. Co. the plaintiff was permitted to recover because in dodging a timber projecting from a passing train she threw herself on the platform and was greatly frightened, which fright caused her bodily injury.[26] So in Warren v. Boston & M. R. Co. where one by reason of fright jumped out of a wagon.[27]

In Berurd v. Boston & A. R. Co., the evidence showed that plaintiff was driving across a railroad when one of his horses was struck by a rapidly moving train which frightened him, causing him to jump to the ground. He was permitted to recover for the nervous shock, although he sustained no other physical injury, and there was no physical impact.[28]

Dulien v. White & Sons is the leading case in England bearing upon this subject. Plaintiff there was frightened and received a nervous shock which produced a premature birth of a child, resulting in physical injury to plaintiff, all caused by defendant's servant driving a team of horses into plaintiff's house. There was no physical impact with plaintiff

[25] 59 N. J. L. 297.
[26] 52 N. J. L. 265.
[27] 163 Mass. 484.
[28] 177 Mass. 179.

and no injury except that resulting from fright. Judgment was given to the plaintiff. This case clearly establishes in that jurisdiction the rule that damages which result from a nervous shock occasioned by fright unaccompanied by an actual impact, but causing physical injury to follow, may be recovered in an action for negligence.[29] But, perhaps the fullest discussion and citation of authorities bearing upon this question will be found in the recent case of Simons v. Rhode Island Co., where the rule adopted in the Dulien case, supra, was approved and followed.[30] This is the leading case in this country on this interesting subject.

48. **Fright without physical injury.**—But mere fright or mental suffering without a resulting physical injury does not give a right of action for damages. This all the courts seem to hold; and the chief reason given for the rule is that as there is no physical evidence of the injury the court would be required to rely wholly upon the statements as to the kind and effect of suffering which the plaintiff might make, and that this would be too speculative and inadequate.[31] Where plaintiff, frightened by defendant's wrongful act, seeks to protect himself, and is injured by jumping or otherwise, defendant may be held for the damages sustained, though if plaintiff

[29] (1901) 2 K. B. 669.

[30] 28 R. I. 186, 66 Atl. Rep. 202, 9 L. R. A. (N. S.) 740. But see the interesting case of Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, where defendant, only to have a little fun, dressed himself in woman's clothes, and at dusk followed a neighbor's wife into the house, but made no demonstration except to tap the end of a parasol on the floor. Plaintiff was frightened, resulting in miscarriage, but no recovery was allowed.

[31] Huston v. Freemansburg, 212 Pa. St. 548.

had remained quiet he would not have been injured.[32] And in such case the damages are not limited to the physical injury but may be made to cover any mental anguish naturally incident to the wrong done.

49. **No recovery for sympathetic suffering.**—But there can be no recovery for fright caused by another's danger, even though such mental disturbance results in a physical injury, as in a case where a mother is frightened and distressed because of an effort to put her children off a car on which they were riding.[33]

So in a case cited in 2 Q. B. (1907) 61, the court held that where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not because of any fear of injury to himself but from seeing another person killed, there could be no recovery for plaintiff's shock and mental suffering.[34]

[32] Barber v. Reese, 60 Miss. 106; Buchanan v. West Jersey R. R., 52 N. J. L. 265; Smith v. St. Paul M. & M. R. Co., 30 Minn. 169.

[33] Sanderson v. Northern Pac. R. Co., 88 Minn. 162.

[34] Smith v. Johnson, 2 Q. B. (1907) 61.

CHAPTER VII.

AVOIDABLE CONSEQUENCES.

50. **Duty to avoid increasing damages.**—Closely connected with the rule that damages must be direct and proximate is the other rule that plaintiff may not recover damages for those consequences of defendant's act which were readily avoidable by the plaintiff. When an act is done which is injurious to the plaintiff he may not sit by and permit damages to accumulate unreasonably, relying upon the hope of compelling defendant to answer for all his losses. Compare Loker v. Damon,[35] where plaintiff sought to recover of defendant the loss of his grass for nearly a whole year because defendant had destroyed a few rods of his fence. But the court said it was plaintiff's duty to avoid the loss of his crops by repairing the fence and that if he failed to do so he could recover of defendant only an amount sufficient to have repaired the fence. Also where a physician sought to take passage on a train which refused to stop for him, and instead of waiting for another train or employing a conveyance to take him to his destination, he walked the entire distance and as a result became ill and suffered greatly, the court held that damages resulting therefrom were consequences which could reasonably have been avoided and refused recovery for them. (I. B. & W. Ry. v. Birney, 71 Ill. 391.)

[35] 17 Pick. 284.

51. **Plaintiff's duty when personal injuries are received.**—It is clearly the duty of one who has received personal injuries by the wrongful act of another, to use reasonable and ordinary diligence to effect a cure. Damages which might have been thus avoided are not chargeable to defendant. One so injured should procure medical and if necessary surgical aid, and if he unreasonably fails to do so, evidence of this fact may be given for the purpose of mitigating damages.[36]

Should the physician make a mistake in treating plaintiff even though damages are thereby increased, if plaintiff was not negligent in connection with the matter, he may hold defendant for all the damages.[37]

52. **Injuries to property.**—The same principle applies to acts which result in injuries to property, as in cases of personal injuries. So where a sewer was defectively constructed by a municipality and plaintiff's property, by reason thereof, was injured in a freshet, the court held it to be the duty of plaintiff, thereafter, to put his property in repair and thereby prevent future injury to it.[38] And where one's property is endangered by the negligent act of another, it is the owner's duty to do all he reasonably can to protect it from injury. Failing to do so, he cannot recover for loss thereafter sustained which might reasonably have been avoided.[39]

[36] Louisville N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409; Allender v. C. R. & I. & P. R. Co., 37 Ia. 264.

[37] St. Louis & S. F. Ry. Co. v. Doyle, 25 S. W. 461 (Tex.); Loeser v. Humphrey, 41 O. St. 378, 52 Am. Rep. 86.

[38] German Theological School v. Dubuque, 64 Ia. 736.

[39] Rexter v. Starin, 73 N. Y. 601; Watkins v. Rist, 67 Vt. 284.

53. **In actions for breach of contract.**—Where defendant breaks his contract with plaintiff, resulting in damages, it is plaintiff's duty, generally, to do whatever is reasonably necessary to reduce the damages. It is on this principle that where plaintiff has been employed to give to defendant his personal services for a definite period of time and has been wrongfully discharged before the full time of employment has elapsed, it becomes plaintiff's duty to seek similar employment elsewhere and to accept it if it can be found, and in this manner reduce the damages caused by defendant's breach of contract.[40]

Where defendant had agreed to keep certain property belonging to plaintiff insured and to notify plaintiff of the amount of the premiums which plaintiff was to pay, but defendant neglected to have the property insured, when it burned, and plaintiff thereby sustained great loss, the court, finding that plaintiff knew of defendant's neglect and failure to insure, held that plaintiff could not recover of defendant such loss because it was his duty to have insured the property himself, thus avoiding the loss resulting from defendant's breach of contract.[41] But the rules above stated do not apply to those contracts which plaintiff can perform by employing the services of others, such as building contracts, or contracts to lease a farm.[42]

[40] Sutherland v. Wyer, 67 Me. 64, LEADING ILLUSTRATIVE CASES; Howard v. Daly, 61 N. Y. 362.

[41] Brant v. Gallup, 111 Ill. 487, 53 Am. Rep. 638; Frick Co. v. Falk, 50 Kan. 644. See also Benziger v. Miller, 50 Ala. 206; Williams v. Chicago Coal Co., 60 Ill. 149.

[42] Sullivan v. McMillan, 37 Fla. 134, 19 So. 340.

54. **Where plaintiff proceeds with the contract after defendant has given notice to stop.**—It is a further rule that plaintiff must do nothing to enhance the damages after defendant has broken the contract and has given plaintiff notice of his repudiation of it.

So if under the contract plaintiff is employed to perform certain work for defendant and is proceeding to do so when notified by defendant to stop before the work is completed, plaintiff has no right to proceed further with the work. Should he do so he will be unable to collect for his services after receiving such notice. This rule is well illustrated in Clark v. Marsiglia.[43]

Plaintiff contracted with defendant to clean for him a number of paintings. After a portion of them had been cleaned defendant notified plaintiff not to proceed with the others, as he had concluded not to have further work done. The plaintiff, however, finished cleaning and repairing all the pictures, notwithstanding this notice, and sought to recover for this work under his contract. But the court held plaintiff could not recover for the work done on the pictures after receiving notice to stop. He could recover for work done up to that time and also damages for defendant's breach of contract, but it was his duty to stop when notified to do so. However, it should be noted that this rule applies to contracts only after they are broken.[44]

There is no obligation on a plaintiff to protect

[43] 1 Denio 317 (N. Y.), LEADING ILLUSTRATIVE CASES.

[44] Baldwin v. United States Tel. Co., 1 Lans. 125 (N. Y. Supreme Court Reps.).

himself against the results of a breach of contract until the breach is made or against a prospective tort until the wrongful act is done. The defendant may not by threatening to do a wrong require plaintiff to take steps to protect himself against such wrong. Plaintiff need only use care after the wrong is done. The rule these cases seem to establish is that plaintiff is under no obligation to attempt to obviate the results of the defendant's anticipated wrong.[45]

55. **Expense of avoiding loss must be borne by defendant.**—Since the law imposes on the injured person the duty of avoiding loss, or of reducing the damages which may result from the wrongdoer's act, it also properly requires the wrongdoer to respond for the reasonable expense incurred by the plaintiff in complying with this rule, whether the effort was successful or not. In Watson v. Bridge this exact question arose where plaintiff sought to have a horse cured of an injury inflicted by defendant, but failed in his effort. It was held that he could recover from defendant not only for the injury to the horse, but for all reasonable expense incurred in his effort to restore the horse to its former condition.[46] To the same effect is Ellis v. Hilton and Murphy v. McGraw.[47]

But plaintiff cannot recover from defendant expenses exceeding the value of the property thus sought to be saved or restored, as this would probably be held not to be a reasonable expenditure under the circumstances.

[45] Plummer v. Penobscot Lumbering Association, 67 Me. 363; Lawton v. Herrick, 83 Conn. 417, 76 Atl. 986.

[46] Watson v. Lisbon Bridge, 14 Me. 201.

[47] Ellis v. Hilton, 78 Mich. 150; Murphy v. McGraw, 41 N. W. Rep. 917.

56. **Forward contracts.**—Under the rule which requires plaintiff to avoid damages on defendant's breach of contract, the question has arisen whether under an anticipatory breach or repudiation by defendant of his contract to buy or sell for future delivery, defendant can impose upon plaintiff the duty of making a forward contract with other persons, as a substitution for defendant's contract, for the purpose of avoiding damages caused by defendant's repudiation.

Ordinarily where, in advance of the time for performance, a contract is repudiated by one of the parties to it the other party is not bound to accept such repudiation and thus in advance regard the contract as broken. He may wait till the time of performance and then insist on the other party complying with its terms. And this seems a most reasonable rule. To hold otherwise is to require one to accept a party's repudiation of his contract as a breach prior to the time of performance, whether one may wish to do so or not. It also requires one to incur an expense and to assume the risk of making a losing bargain because of the wrong of the other party. For even in an anticipatory breach of contract damages are measured, as of the time of performance stipulated in the contract.

Let us suppose that A contracted to sell to B ten thousand bushels of wheat on May 1, to be delivered September 1 following, at the price of one dollar per bushel. June 1 A notifies B that he will not fulfill his contract when the time for performance arrives. Is it B's duty now when wheat, say, is

one dollar and ten cents a bushel, to contract with C to furnish him this wheat in September? If so, it must also be his duty to notify A that he has done so, thus clearly accepting A's breach. But if he sues A for his breach of contract his damages will be measured not by the price of wheat in June but by the price of wheat September 1, the time specified for delivery. If wheat at that time is worth in market only ninety cents per bushel the law has by these rules punished B for A's wrong. This clearly should not be the law. Yet in Roth v. Tysen the court seemed to hold that plaintiff must make a forward contract in such a case in order to avoid the damage arising from the defendant's repudiation of his own contract.[48]

57. **Anticipatory breach.**—Wherever there is a breach of contract by defendant prior to the time of performance, if plaintiff waits till after the time when the contract should have been performed before accepting the breach, or bringing his action on account of it, the damages are estimated in the same way and under the same rule as if the breach had not occurred before the time of performance. But if the plaintiff chooses to do so he may at once accept defendant's repudiation, or anticipatory breach, thus at once putting an end to the contract, and thereby cut off defendant's privilege of later changing his mind and fulfilling the contract. It is in such a case, where plaintiff later sues for the breach of the contract, that the question whether it was plaintiff's duty to make a forward contract to prevent the ac-

[48] 12 T. L. R. 211, 73 L. T. Rep. 628.

cumulation of damages, arises and must first be disposed of.

In Smith v. McGuire,[49] referring to this point, Martin, B., said: "It would be doubtful whether a party who breaks a contract has a right to say to a party with whom he breaks it, 'I will not pay the damages arising from my breach of contract, because you ought to have done something else for the purpose of relieving me of it.' I am not satisfied that the person who breaks a contract has a right to insist on that at all. It seems to me that matter ought to be dismissed entirely from consideration." Kelly, C. B., in the case of Brown v. Muller (L. R. 7 Ex. 319), holds that there is no such obligation on the plaintiff, and that the defendant might fairly say "that the plaintiff had no right to enter into a speculative contract. * * * Or, again, by such a course the plaintiff might be seriously injured and have no remedy. He would, in that case, be without redress; he would have lost his former contract, and his new one would turn out worthless." It would thus seem a hard rule to apply to defendant.

The question apparently is not squarely decided by any of the courts of this country, although it was held in Missouri Furnace Co. v. Cochran that where defendant had repudiated his contract and plaintiff, accepting the repudiation, at once made a forward contract at a price which proved to be higher than the price of the commodity at the time of performance specified in the contract, in recovering damages plaintiff was bound by the price at the

[49] 27 L. J. Exch. 465.

time fixed for performance and not at the time when his forward contract was made.[50]

Evidently the theory of this case is opposed to that of Roth v. Tysen, supra, and tends to sustain the view that plaintiff should not be required in such a case to make a forward contract.

58. **Reduction of damages.**—Defendant may give evidence of certain facts showing that the damages against him should on account of such facts be reduced; as where the act inflicting the injury at the same time conferred a benefit on plaintiff. In Jewett v. Whitney defendant wrongfully took possession of an old mill in which plaintiff had a one-half interest. Defendant tore down the old mill and erected a new one in its place. It was held that while defendant was a trespasser, plaintiff was not damaged, because the benefits to his property were greater than the injury.[51] So where defendant is sued for conversion of property he may show that plaintiff or someone on his behalf accepted some reparation or benefit on account of such conversion or received the property or a portion of it back.[52]

To this extent there may be a reduction of damages caused by the conversion. But even though the goods or a portion of them have been returned and accepted, plaintiff is not thus deprived of his cause

[50] Missouri Furnace Co. v. Cochran Adm'x., 8 Fed. 463, LEADING ILLUSTRATIVE CASES. Other cases bearing on the subject but still leaving it unsettled are: Leigh v. Paterson, 8 Taunton 540; Brown v. Muller, L. R. 7 Ex. 319; Kadish v. Young, 108 Ill. 170, 48 Am. Rep. 548; Hinckley v. Pittsburg Steel Co., 121 U. S. 264; Roehm v. Horst, 178 U. S. 1.

[51] 43 Me. 242.

[52] Lucas v. Trumbull, 81 Mass. 306; Merrill v. How, 24 Me. 126; Stephenson v. Wright, 111 Ala. 579; Hopple v. Higbee, 23 N. J. L. 342.

of action, and such facts may be proven only to reduce the damages and not as a complete defense.[53]

Where goods of plaintiff are converted by defendant, or defendant, being in possession, has on demand wrongfully refused to give them up, he may not thereafter tender them to plaintiff or compel plaintiff to take them back against his will, and thus secure a reduction of damages for the conversion.[54]

59. **Benefits by operation of law or from a stranger.**—When it can be shown that by operation of law the injured person is benefited in connection with the cause of injury, this may be proved by defendant to reduce the damages sustained. Thus when under a writ against the owner of the goods a sheriff took them from a wrongdoer and applied the proceeds to the debt of the owner, these facts may be shown to reduce the damages.[55] Generally, however, the wrongdoer will not be permitted to take advantage of a benefit conferred by a third person whereby the damages may have been reduced. Such a benefit inures to the advantage of the injured party but not to the wrongdoer.

So where defendant wrongfully took the goods of plaintiff in attachment and they burned while in his possession, he was not permitted to show, when sued for damages, that plaintiff had received from the insurance company the amount for which the goods were insured.[56]

[53] Watson v. Coburn, 35 Neb. 492, 53 N. W. Rep. 477.

[54] Gilbert & Miller v. Peck, 43 Mo. App. 577; Clark v. Hallock, 16 Wend. 607; Hart v. Skinner, 16 Vt. 138.

[55] Lazarus v. Ely, 45 Conn. 504; Collins v. Perkins, 31 Vt. 624.

[56] Perrott v. Shearer, 17 Mich. 48.

Also where plaintiff was injured by defendant's negligent act, he was permitted to maintain an action for damages to recover of defendant the value of the services of a nurse, even though such services were contributed to the plaintiff by members of his own family free of any expense to him.[57]

[57] Brosman v. Sweetser, 127 Ind. 1; See Elmer v. Fessenden, 154 Mass. 427.

CHAPTER VIII.

VALUE.

60. **Higher intermediate value.**—The general rule relating to the measure of damages for the conversion of property is that the market value of the property at the time and place of its conversion may be recovered. Ordinarily this rule will be found to measure plaintiff's loss justly and properly. And so upon a breach of contract for the sale of property the damage may generally be measured by the market value of the property at the time and place of delivery stipulated in the contract. But certain facts may appear which will justify the adoption of a different rule. Where property of a fluctuating value has been converted, many courts have held that the highest market price of the commodity from the date of conversion to the time of trial could be recovered against the wrongdoer. But this rule gave to the owner a great advantage which in many cases seemed unfair, as he had the chance of waiting till the market changed many times and then selecting the highest mark it had made with which to measure his damage.[58]

The question was thoroughly examined in Baker v. Drake and the following rule adopted, namely, that in actions for conversion of stocks the measure

[58] Markham v. Jaudon, 41 N. Y. 235; Rand v. White Mountains R. R. Co., 40 N. H. 79.

of damages is the highest market price within a reasonable time after plaintiff has been given an opportunity by due diligence to go into the market and purchase similar property with which to indemnify himself.[59] This rule has been applied especially to the sale of stocks, or to their conversion, and it seems to be growing in favor wherever it can be applied to the sale or conversion of any property the market value of which frequently changes.

61. **Where there is no market value of property.** —It not infrequently becomes important to establish the value of property for which there is no general market and therefore no market value. The market value may not properly measure plaintiff's damages where from the situation of the property, or from its character, there is no market for it. Thus if it can be shown that property converted has a special value, plaintiff is entitled to a recovery based on that value. Property of this kind may exist of which no proof of value in market could be given because it is not known in the market. But it by no means follows that a court may not adjudge damages for the destruction of such property.

The evidence to establish value in such cases must vary according to the facts in each case. So if the property is useful for some special purpose evidence of such use is properly admitted. Where an action was begun against defendant for burning grass on the farm of plaintiff, the court admitted evidence of the value of grass as hay, as well as for pasturage

[59] 53 N. Y. 211; Wright v. Bank of Metropolis, 110 N. Y. 237, 6 Am. St. Rep. 356; Galigher v. Jones, 129 U. S. 193; Citizens Street R. R. v. Robbins, 144 Ind. 671, 25 Am. St. Rep. 445.

purposes, and said that any evidence tending to show what the grass was worth put to any of the uses for which it was valuable was proper.[60] In Boom Co. v. Patterson,[61] the question of the value of certain small islands was involved. The Boom Company sought to condemn these islands for their own special use. The court held that the inquiry in such case must relate to what the property is worth from its availability for all valuable uses. It was held that the owner's compensation is to be estimated by reference to the uses which may be made of the property, having regard to the wants of the community now and in the future. The use to which the owner had put the property, or the fact that he had not used it at all, or had permitted it to go to waste, was regarded as immaterial. So in the sale of coal at a place where the particular coal had no market value, as in Grandtower v. Phillips,[62] the court permitted the plaintiffs to show the price they would have been required to pay for such coal as that mentioned in the contract, at the nearest available market where it could have been obtained. It was held that the difference between such price and the price stipulated for by their contract, in addition to the increased expense of transportation and hauling, would be the true measure of damage. So in the case of the conversion of clothing which has been worn, since there is no market value for such articles, it has been held that the owner might recover the full value of the clothing for use to himself, and not

[60] Gulf, etc., Ry. Co. v. Matthews, 3 Tex. Civ. App. 493.
[61] 98 U. S. 403, LEADING ILLUSTRATIVE CASES.
[62] 23 Wall. 471.

merely what it could be sold for in money.[63] In Green v. Boston & Lowell R. R. Co., plaintiff sought to recover the value of an oil painting, a portrait of plaintiff's father, which of course had no market value. It was held that evidence of its cost and of the fact that the plaintiff had no duplicate of this picture, of the expense of reproducing it, and the question whether or not it was practicable to reproduce it was competent to determine what damage plaintiff might recover for its loss.[64]

62. **No value, or artificial value.**—It may be that the article converted or destroyed not only has no market value, but by reason of its being a nuisance and contrary to law to own or use it, it may be held to have no value whatever for which plaintiff can recover damages. In Du Bost v. Beresford,[65] plaintiff sued to recover the value of a picture which had been destroyed by defendant. It was claimed that the picture was a libel upon defendant's sister and to exhibit it publicly was a nuisance which anyone had a right to abate by destroying the picture. The court took this view of the matter and refused to allow plaintiff any damage for the value of the picture itself.

An interesting case relating to the question of value of property involved, arose in Kountz v. Kirkpatrick.[66] This was an action for non-delivery of oil, sold by Kountz to Kirkpatrick for future delivery. Defendant sought to show that about the time

[63] Fairfax v. New York Central & Hudson River R. R., 73 N. Y. 167.
[64] 128 Mass. 221.
[65] 2 Camp. 511.
[66] 72 Pa. St. 376.

when the oil should have been delivered according to the terms of the contract, plaintiff, with other dealers in oil, entered into a combination for the purpose of raising the price of oil, and that they succeeded in placing a high artificial price on oil which was not its real market price; and that for this reason defendant was unable to procure oil with which to fill his contract with plaintiff. The court held that an inflated speculative market price, not the result of natural causes, but of artificial means to stimulate prices by unlawful combinations for the purposes of gain, cannot be a legitimate means of fixing a market; that a mere speculative price fixed by the contrivance of a few interested dealers is not the true test of the market value of the commodity. In this case the court held the defense valid.

It did not decide, however, that an artificial market thus established in a commodity by others aside from plaintiff, and with which plaintiff was in no way connected, would prevent plaintiff from recovering from defendant damages for breach of contract on failure to deliver such commodity. It would seem that since the measure of damages is the difference between the contract price and the market value of the article at the time it should have been delivered, this rule would not apply where the market value was artificially established by a combination of dealers with whom plaintiff was in no way connected.

63. **Proof of value.**—The proof of value of property relates generally to the time of its destruction or conversion by defendant, and to its market value

at the place where the property was, when the wrong was committed. The value of the property then and there furnishes the measure of plaintiff's damages. Ordinarily this will be the market value, except in such cases as heretofore shown not to fall within the rules relating to market value. In practically every case where damages are demanded, evidence of the damages produced must be presented to the jury by competent witnesses testifying in the case. Courts have frequently refused a recovery to plaintiff on the ground that no evidence of the value of the property involved or of the labor performed, or of the damage sustained had been given, and hence no basis for a judgment was established.

The case of Leeds v. Metropolitan Gas Light Co.[67] was reversed because evidence of this character was not produced. The court said: "It was not shown what his business was, or the value of his time or any facts as to his occupation from which that value could be estimated. The jury were left to guess or speculate upon this value without any basis for their judgment, so far as loss of time was an element of the damages awarded." The rule in such cases is that where the loss is pecuniary and can be measured, and plaintiff fails to show its extent, or the value of the time or property in controversy, only nominal damages can be recovered. But this rule has not always been strictly followed. The courts have sometimes permitted the jury to exercise their own general knowledge and common experience relating to the matter in controversy, and when it

[67] 90 N. Y. 26.

is apparent that they have done this intelligently, have permitted their verdict to stand.

Thus in Bradford v. Cunard Steamship Co.,[68] which was an action to recover for goods damaged by defendant, the court said: "We cannot say that a jury would not be warranted in finding as a matter of common experience, that damages of such a nature to such goods could not be less than five hundred dollars." In Hossler v. Trump,[69] an action for services rendered, the question discussed and on which the case turned was whether the jury should have been permitted to estimate the value of the services from their character and extent, unaided by the opinion of a witness touching such value. It was held that where plaintiff shows services rendered and their nature, the jury is justified in using their own personal knowledge in estimating their value.

While the holding in these cases seems to be justified by the particular facts there shown, and by other cases of a similar nature,[70] it would be unsafe to extend very far the principle therein announced. In all matters of value upon which juries are to return a verdict, direct evidence of such values in the nature of opinions of witnesses, based upon proper facts, is exceedingly important, if not absolutely necessary.

[68] 147 Mass. 55.

[69] 62 O. St. 139.

[70] McIntyre's Ex. v. Garlick, 8 C. C. Rep. 416 (Ohio); Baum v. Winston, 3 Met. 127 (Ky.); O'Hanlan v. Great Western Railway, Queen's Bench (1865), 6 B. & S. 484, LEADING ILLUSTRATIVE CASES.

CHAPTER IX.

INTEREST.

64. **Interest as damages.**—The discussion of the law relating to interest comes properly under the subject of damages, because originally interest was allowed as damages for failure to pay money when due. The courts now frequently refer to an allowance to plaintiff of a certain amount by way of damages because defendant delayed in compensating plaintiff. It is said to be given, not as interest, but somewhat in the nature of interest.[71]

In the early common law interest was not allowed, but on the other hand was prohibited. Yet as money is property, the use of which is valuable, it seemed unreasonable to prohibit taking compensation from one who borrowed it and was willing to pay for the advantage thus secured, and in 37 Hen. VIII c. 9, it was made lawful to take interest for money loaned.[72] In this country statutes relating to interest are enacted not for the purpose of authorizing the collection of interest, but to limit the amount which may be collected. The rate fixed by statute not only limits the amount which one may legally contract to pay, but governs generally the measure of damages in breach of contract to pay money. It is not unusual for plaintiff to attempt to collect more

[71] Richards v. The Citizens Natural Gas Co., 130 Pa. St. 37.
[72] Lowe v. Waller, 2 Douglas 736 (Eng.).

than the legal rate where defendant failed to pay promptly, by showing that if defendant had kept his contract plaintiff could have made large profits in advantageous investments, or could have prevented loss to himself. The courts have held evidence of this character inadmissible,[73] not only because such profits are speculative and uncertain but also because the damage for failure to pay money is the legal rate of interest.

65. **When interest payable.**—Aside from contract interest is payable from the time a debt or claim is due and should be paid. It is immaterial whether or not the parties have in advance agreed upon the payment of interest. The law gives to the creditor interest for the use the debtor has had of his money, just as it would give compensation for the use of lands or chattels.

66. **Liquidated demands.**—It is sometimes said that interest can be collected only on liquidated demands. But there grew up so many exceptions to this rule that the rule itself no longer states the law. If the amount can be ascertained by computation or by market values, or other facts readily obtainable, the debtor will not be excused from paying, but will be required to pay interest for his delay. And so although it may be difficult to determine the amount due, if this duty rests upon the debtor and he has failed to take the requisite steps to determine the amount he will be held for interest.[74]

[73] Greene v. Goddard, 9 Met. 212 (Mass.).

[74] Van Rensselaer v. Jewett, 2 N. Y. 141; McMahon v. New York and Erie Railroad, 20 N. Y. 463.

67. **Demand, when necessary.**—In many cases interest will not begin to run on a debt or obligation until a demand for payment has been made. If the debtor is not in default, but some condition precedent was required to be performed or some event happen before he was obliged to pay, then interest will run only from the performance of such condition or the occurrence of such event. A demand is a common precedent condition, in case no time is fixed for payment or in claims payable on demand, or where one has received money by mistake. The courts are divided on the question whether a note payable on demand bears interest before payment is demanded. It is said by some courts that such a note is due upon delivery and bears interest from date.[75] Others hold that a demand is required to start interest on a note of this character. The former rule is probably more in accord with the intention of the parties, as interest is usually expected for money loaned, whether the debt is to continue a long or a short period of time.

68. **Place of performance.**—Interest on contracts to be performed in a place other than where the contract is made is counted at the rate at the place of performance. Where no place of performance is named the rate at the place of making the contract will govern; if suit is in a jurisdiction different from the place of making the contract and no interest is designated in the contract the legal rate where the contract was made will be adopted if proven. If not

[75] Dailing v. Wooster, 9 O. St. 517; Hill v. Henry, 17 O. 9; Curtis v. Smith, 75 Conn. 429; Omohundro's Ex'r v. Omohundro, 21 Gratt. 626 (Va.).

proven it will be presumed to be the same as the rate in the place of trial.

69. **Legal rate.**—By legal rate of interest is meant the rate which is fixed and allowed by law, where the parties have not agreed upon any rate. The statutes generally permit parties to contract for a rate higher than that designated the legal rate. But there is also a limit usually fixed beyond which parties may not contract; interest beyond this limit is usurious.

70. **Rate after note matured.**—Whether a note will bear the contract rate or the legal rate only, after maturity, where the parties have failed to indicate, is a mooted question. It is contended on the one hand that the legal rate governs after maturity as damages for failure to pay money when due,[76] while on the other hand it is claimed that the contract rate continues as an implied part of the contract till the debt is paid. The weight of authority and the better reason seem to sustain this latter position.[77]

71. **Compound interest.**—There has been much prejudice against compound interest or counting interest on interest. If the parties in their contract have not indicated in any way that interest is to be paid on past due interest, courts will allow simple interest only. But if in the contract it is clearly expressed that interest when past due shall bear interest, as in case of interest coupons attached to

[76] Eaton v. Borssonnault, 67 Me. 540; Brewster v. Wakefield, 22 How. 118.

[77] Miller v. Burroughs, 4 Johns. Ch. 436; Brannon v. Hursell, 112 Mass. 63; Monnett v. Sturges, 25 O. St. 384.

bonds, most of the courts hold the contract valid and allow such interest. If, however, the contract simply states that interest is to be paid annually, a majority of the courts, it appears, refuse to permit interest to be collected on interest which is past due.[78] But on the other side eminent authority and courts of recognized ability may be cited holding the other way, and permitting interest on an interest debt past due, as on any other debt.[79] In no case will the interest upon interest be permitted to bear interest.[80]

72. **The jury's discretion to allow interest in actions sounding in tort.**—The rule which permits the recovery of interest only in the discretion of the jury probably had its origin in the English statute, 1 and 4 William IV, where the right to interest as part of the damages was first authorized to be given only in the discretion of the jury in actions of trover and trespass. In this country, in the absence of any statute bearing on the subject, courts began following the English decisions which were rendered under this statute and permitted interest in this class of cases to be given only in the jury's discretion.[81] But the courts now generally divide actions sounding in tort into three classes relating to the matter of interest, namely, (1) those actions in which interest may not be collected, such as assault and battery,

[78] Bowman v. Neely, 151 Ill. 37; McVicar et al. v. Denison et al., 81 Mich. 348.

[79] Anketel and wife v. Converse et al., 17 O. St. 11; Rix v. Strauts, 59 Mich. 364; Lanahan v. Ward et al., 10 R. I. 299.

[80] Anketel and wife v. Converse et al., 17 O. St. 11.

[81] Hyde v. Stone, 7 Wend. 354; Bissell v. Hopkins, 4 Cow. 53 (N. Y.).

libel, slander, seduction and false imprisonment, all of which relate to personal injuries. (2) Such actions as trover, replevin and trespass, relating wholly to property loss by plaintiff, damages for which may be easily measured. In this class of cases interest is allowed as matter of right, from the date of conversion to the time of trial.[82] (3) But the courts constitute a third class, of those cases where there is simply an injury to or destruction of property, not beneficial to the wrongdoer. In such cases it is generally held that the jury may in its discretion allow interest or damages for the wrongdoer's delay in making reparation, but that the court may not direct the jury so to allow interest, as it is not a matter of absolute right in plaintiff's behalf, although when allowed it is because plaintiff was entitled to it as compensation.[83]

73. **Interest as a matter of right.**—When it is conceded that interest is part of plaintiff's compensation to be given as indemnity and not as punitive damages, it follows logically that the jury should be instructed to allow interest. But in Richards v. The Citizen's Natural Gas Co.,[84] an action to recover damages for wrongful destruction of plaintiff's goods, the court held that such an instruction was erroneous. It was said that in such cases the question whether any amount should be given plaintiff as damages on account of defendant's delay in paying for the goods destroyed, must be left to the

[82] P. S. V. R. Co. v. Ziemer, 124 Pa. St. 560; Duryee v. Mayor, etc., 96 N. Y. 477.

[83] Richards v. The Citizen's Natural Gas Co., 130 Pa. St. 37.

[84] 130 Pa. St. 37.

jury's discretion. This court, however, had previously held, in City of Allegheny v. Campbell,[85] that plaintiff was entitled to interest as a matter of right. The facts here were as follows: The defendant city owned a certain wharf which it licensed plaintiff to use upon the payment of a stipulated amount as wharfage. Afterwards the city gave to a railway company the privilege of laying tracks along the wharf. While engaged in laying its tracks the railway company took out of the wharf certain posts theretofore used in mooring crafts and vessels. The company also deposited a quantity of stones and debris on or near the wharf. Plaintiffs notified the city to replace the posts and to remove these stones, but it neglected to do so. Later the river rose very high and several flats and a float belonging to plaintiff were torn from their moorings at the wharf and were carried away and lost, because of the city's neglect to restore the wharf properly to its former condition. For this loss plaintiff sued the city and recovered. Defendant claimed that the court erred in instructing the jury that if they found for plaintiff they should allow interest. But this was held not to be an error. The court said that without the addition of interest on the value of the property from the time it was destroyed, the remedy of the plaintiff would be inadequate, and that in such cases interest is properly allowed.

74. **Same subject—Interest as compensation.**—The Lawrence Railroad Company v. Cobb[86] was an

[85] 107 Pa. St. 530; Wilson v. City of Troy, 135 N. Y. 96, 31 Am. St. Rep. 817, LEADING ILLUSTRATIVE CASES.

[86] 35 O. St. 94.

action for damages caused by excavating in front of plaintiff's lot, thereby destroying access to the lot. The court instructed the jury that if they found for the plaintiff, interest should be added as part of plaintiff's compensation. In response to defendant's objection to this instruction, the court stated that where reparation was delayed by the wrongdoer, the injured party could not be made whole unless the damages awarded should include compensation in the nature of interest for withholding the reparation which should have been promptly made. Snow v. Nowlin[87] was an action against defendant for misrepresenting the value and location of land conveyed by defendant to plaintiff. The court here held that interest should be allowed as damages for fraudulently representing the value of land sold to the plaintiff to be much greater than its real value.

Relating to this subject, in Chapman and another v. The Chicago and Northwestern Ry. Co.,[88] the court said: "The damage to the plaintiff was the value of the property destroyed. That value was readily ascertained. It was therefore as if the court had instructed the jury that the damages of the plaintiff would be the value of the property destroyed with interest from the time of the commencement of the action. In trespass, trover or replevin for the same property taken or converted by the defendants such would have been the legal rate of damages, or rather the value with interest from the time of the taking or conversion. Why should not

[87] 43 Mich. 383.
[88] 26 Wis. 295, LEADING ILLUSTRATIVE CASES.

the same rule prevail in this action? We are at a loss to assign any good reason for the distinction, if it can be said that it exists; or if it can be said to be in the discretion of the jury to give interest by way of damages in this case, whilst in the others they must give it as matter of strict legal right."[89]

These authorities clearly indicate that the tendency of the courts is to abrogate the rule that in actions for injury to or destruction of property it lies within the discretion of the jury to allow or not to allow interest on the damages sustained by plaintiff and withheld by defendant. There should be no distinction in the matter of allowing interest between cases of this kind and actions for conversion, trover or replevin, in all of which interest is allowed as a matter of right.

[89] The New York, New Haven & Hartford Railroad Company v. The Ansonia Land & Water Power Company, 72 Conn. 703; McInroy et al. v. Dyer, 47 Pa. St. 118.

CHAPTER X.

LATERAL SUPPORT.

75. **Removing lateral support.**—Questions relating to lateral support of land, and the recovery of damages for removing such support, are of especial interest in connection with urban property. The rapid development of cities, where heavy buildings requiring deep foundations are erected on land so valuable that it is important to leave no vacant space upon it, has frequently raised the question of the adjacent landowner's right to lateral support, and has developed so much litigation that some of the states have undertaken by legislation more clearly to fix the rights of adjoining owners. In order to reach a conclusion which is in any degree satisfactory relating to damages, where lateral support has been removed, the question of most importance to be first settled pertains to the right and interest which the adjacent owner has to lateral support.

If lateral support is a property right passing with the land, it is then held by the same title as the land itself and is subject to similar rules of law and can be taken only by the same means and under the same restrictions as any other portion of the land. Neither a court nor a legislature could give to anyone the right or power to take it from the landowner except for a public purpose, and then only upon condition of paying him its full value. But it has been held

that one may on his own land dig so near that of his neighbor as to cause its collapse without being responsible for the damage thus caused.[90] In Ohio a statute has been enacted[91] which provides that a lot owner may excavate his own lot to a depth of nine feet below the established grade of the street on which the lot abuts without incurring liabilities imposed by other sections of the statute; and it has been held by a lower court that no liability whatever would be incurred thereby.[92] The court said: "The conclusion must be that the common law doctrine of lateral support no longer obtains in Ohio, and that in any city or village the owner or possessor of a lot may, with impunity in the absence of negligence, and upon giving the proper notice, grade the surface of his lot to make it conform to the established grade of the street." Notwithstanding, it is submitted that this conclusion is radically wrong.

76. **Lateral support a property right.**—But the Supreme Court of Ohio had previously held[93] that the right of lateral support is a property right which may not be invaded or injured by anyone without incurring the obligation to repair the injury or respond in damages therefor. It was clearly held to be the private property of the landowner which could not be taken even for a public purpose without making to the owner full compensation for its use. It is not simply an incidental injury to property. It is a taking of property itself and falls therefore

[90] Radcliff's Executors v. The Mayor of Brooklyn, 4 N. Y. 195.
[91] § 3783 General Code.
[92] Hall v. Kleeman, 4 O. N. P. 201 (O. S.).
[93] Keating v. Cincinnati, 38 O. St. 141.

within the prohibition of the Constitution, providing that private property shall ever be held inviolate.

In Foote v. Cincinnati,[94] it was held that a statute which provided for the appropriation of private property without also requiring compensation was unconstitutional and void. The courts have repeatedly emphasized the rule that private property can not be taken, even for a public purpose, without making just compensation to the owner, and they have as frequently asserted that a law which attempts this is a nullity. In a later lower court decision,[95] the question of lateral support and the rights therein of adjacent landowners, both at common law and under the Ohio statute, was again discussed. The court held that the statute above referred to did not abrogate the common law rule relating to lateral support in Ohio; that the right to lateral support is not a mere easement, but is part of the owner's property in the land and that if by the statute an attempt is made to deprive him of this property right the statute is in conflict with § 19, Article I of the Ohio Constitution. In Joyce v. Barrow,[96] the court said: "The right of lateral support is held to be not a mere easement but part of the owner's property in land. It is regarded as a right of property which necessarily and naturally attaches to the soil and passes with it." Lord Selborne, in Dalton v. Angus,[97] said "Lateral support is a right by law; a right of the owner to the enjoyment of his own property as dis-

[94] 11 O. 408.
[95] Beldon v. Franklin et al., 8 O. C. C. Rep. 159 (N. S.).
[96] 67 O. St. 264.
[97] L. R. 6 App. C. 740, 791 (Eng.).

tinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible on the principle, *Sic utere tuo ut alienum non lædas.*"

77. **Same subject—Rule stated.**—The authorities sustaining this proposition are abundant and practically unanimous.[98] Justice Green, who examined the question very thoroughly, as shown by his opinion in McGuire v. Grant, cited above, there asserted that the only judicial opinion he could find in conflict with this rule was the case of Radcliff's Ex'rs v. Mayor of Brooklyn,[99] and as will be seen by an examination of the later New York case cited, the rule there laid down is no longer the law in that state. So now the rule in all the states seems to be that stated by the court in McGuire v. Grant, that there is incident to land in its natural condition a right to support from the adjoining land, and that if the land falls away in consequence of the removal of such support the owner is entitled to damages to the extent of the injury sustained. That it is, then, as much of a property right as any other portion of the land, seems to be well settled by courts both in this country and England.[1] In Humphries v. Brogden,[2] the court said: "This right to lateral support from adjoining soil is not like the support of one

[98] Mears v. Dole, 135 Mass. 508; Hendricks v. Spring Valley Mining & Irr. Co., 58 Cal. 190; McMaugh v. Burke, 12 R. I. 499; McGuire v. Grant, 1 Dutcher's Rep. 356 (N. J.), LEADING ILLUSTRATIVE CASES; Farrand v. Marshall, 19 Barb. 380; Damkoehler v. Milwaukee, 124 Wis. 144; Schroeder v. City of Joliet, 189 Ill. 48; Lasala v. Holbrook, 4 Paige 169; Richardson v. Vermont Cent. R. Co., 25 Vt. 465.

[99] 4 N. Y. 195.

[1] Rowbotham v. Wilson, 8 El. & Bl. 123 (Eng.).

[2] 12 Q. B. 739 (Ad. & El., N. S.) (Eng.).

building upon another supposed to be gained by grant, but it is a right of property passing with the soil." So the court held in Lasala v. Holbrook.[3] In Farrand v. Marshall,[4] the court said: "The right of lateral support must be regarded as an incident to the soil. It is a right of property necessarily and naturally attached to the soil."[5]

78. **Lateral support taken by municipality.**—In fact, there seems to be no division of opinion upon the proposition that private property may not be taken from its owner except for a public purpose, and after paying him due compensation for it. The division of judicial opinion is upon the question whether removing lateral support is actually taking property, or is only a damage to property without legal injury, not falling within constitutional prohibitions and therefore damnum absque injuria. In Talcott Bros. v. Des Moines,[6] the court said: "The constitution must be construed to mean not only that the taking must be direct, but it must amount to an actual invasion and appropriation of the abutting property, or of some part thereof, in such manner as to deprive the owner of the use thereof." And although lateral support was here taken and plaintiff's property was thereby damaged, the court held the municipality not liable.[7]

On the question whether a municipality has a right

[3] 4 Paige 169.

[4] 19 Barb. 380.

[5] Gilmore v. Driscoll, 122 Mass. 199; McGuire v. Grant, 1 Dutcher's Rep. 356 (N. J.), LEADING ILLUSTRATIVE CASES; Dorrity v. Rapp, 72 N. Y. 307.

[6] 109 N. W. 311.

[7] Hendershott v. Ottumwa, 46 Ia. 658, 26 Am. Rep. 182; Meares v. Wilmington, 31 N. C. (9 Ire. L.) 73, 49 Am. Dec. 412.

in grading streets to take away this lateral support, without responsibility to the owner, the authorities are in conflict. The courts holding municipalities not liable in the exercise of care and skill in taking away lateral support of land adjacent to the street, go upon the theory that a public body acting within its province in performing work for the benefit of the general public, that is, when building streets and public highways, should not be held responsible for consequential damages in the performance of such duties, and that the injury to adjacent land in being thus deprived of lateral support results only in consequential damages.[8]

79. **Is damage only consequential?**—It is held that the constitutional provisions in favor of parties whose property is taken for public use apply here just as in other remote consequences which result from grading streets; and although it may be seen that the property is injured by the acts of the municipality the rule of damnum absque injuria applies.[9] The courts so holding go upon the theory that taking away lateral support for a public purpose without compensation is not prohibited by those provisions in the state and federal constitutions requiring compensation to the owner for property taken, because the physical property itself is not taken but only injured. They hold, therefore, that municipalities

[8] Transportation Co. v. Chicago, 99 U. S. 635, 641; Smith v. Corp. of Washington, 20 Howard 135; Callender v. Marsh, 1 Pick. 418; Pontiac v. Carter, 32 Mich. 164; O'Connor v. Pittsburgh, 18 Pa. St. 187; Rome v. Omberg, 28 Ga. 46.

[9] Fellowes v. New Haven, 44 Conn. 240; Talcott Bros. v. Des Moines, 134 Ia. 113, 109 N. W. 311, 12 L. R. A. (N. S.) 696; Austin v. Detroit Y. and A. A. Ry., 134 Mich. 149.

or quasi-public institutions are not responsible in damages for thus removing lateral support because such injury is only consequential to an act, which in itself is perfectly legal, such as grading a street, or excavating for a railway track. In O'Connor v. Pittsburgh,[10] the court said: "The constitutional provision for the case of private property taken for public use, extends not to the case of property injured or destroyed; but it does not follow that the omission may not be supplied by ordinary legislation. No property was taken in this instance; but the cutting down of the street consequent on the reduction of its grade, left the building useless, and the ground on which it stood worth no more than the expense of sinking the surface of it to the common level. The loss to the congregation is a total one, while the gain to holders of property in the neighborhood is immense. The legislature that incorporated the city never dreamt that it was laying the foundation of such injustice; but, as the charter stands, it is unavoidable." But it will be observed that the court is here referring only to property taken for a public purpose; so that the rule stated could not apply to lateral support taken by a private person for private use.

In an extended opinion in Fellowes v. City of New Haven,[11] it is held that a municipality is not liable for damages and hence may not be enjoined from grading the street to the property line of an adjacent landowner and thus taking away his lateral support.

[10] 18 Pa. St. 187.
[11] 44 Conn. 240.

Conceding that such owner's property is injured the court holds the injury to result from the exercise by the municipality of a public duty and that the damage arising therefrom may not be recovered against the city, but must be borne by the land owner.[12] It is held that such taking is not unlawful or wrongful; and since it is done, theoretically at least, for public benefit, private interests must yield to such public accommodation, and the landowner cannot recover damages for such consequential injuries. But courts so holding have lost sight of the important point which we think thoroughly established, namely, that lateral support is property belonging to the landowner and that therefore its removal does not fall within what is ordinarily denominated consequential damages from such improvements. The rule, therefore, refusing damages for inconveniences, or for a depreciation in value of adjacent lands where the grades of streets are changed, or where they are used by quasi-public institutions without imposing additional burdens on the land, has here no application. A rule preventing the landowner from recovering for such consequential damages may well be established, though even here the decisions are not uniform. It is frequently pointed out by various courts in the discussion of this question that the decisions in Ohio are most liberal toward landowners in this regard, and have given damages for consequential injuries where under sim-

[12] Austin v. Detroit Y. & A. A. Ry., 134 Mich. 149; Talcott Bros. v. Des Moines, 134 Ia. 113, 109 N. W. 311; Rome v. Omberg, 28 Ga. 46; Callender v. Marsh, 1 Pick. 418; Pontiac v. Carter, 32 Mich. 164.

ilar conditions they would have been denied in other jurisdictions.[13]

80. **Compensation to owner is required.**—The weight of authority is against the rule stated in some of the foregoing decisions which permits public and quasi-public corporations to take away lateral support without compensation, when authorized by the legislature to use or grade the streets of a municipality. It is difficult from the owner's standpoint to see why any person or institution should be given a right to take from him his property without compensation. Even though it be taken for the public good, the public which receives the benefit should pay for what he is required to yield to it. And so the courts generally hold.

In Transportation Co. v. Chicago,[14] the court after stating that while in such a case as there presented, the landowner could not recover for consequential damages, he was not deprived of recovering damages for loss of lateral support, whoever might take it. "The general rule," it was said, "may be admitted that every landowner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his own land, is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land."

In Damkoehler v. Milwaukee,[15] the court held the

[13] McComb v. Akron, 15 O. 474; Akron v. McComb, 18 O. 229; Crawford v. Delaware, 7 O. St. 459.

[14] 99 U. S. 635.

[15] 124 Wis. 144.

city responsible for removing lateral support from premises adjoining a highway, while making necessary improvements of the street. This was held to be a taking of property for a public use.[16]

In Keating v. Cincinnati,[17] the court said: "Private property is entitled to the same protection against all classes of corporations as against natural persons, subject to the right of appropriating such property to public use upon the terms of making full compensation." The city was under this rule held responsible for taking away lateral support from private property adjacent to the street while grading the street.

81. **Rule when building on land.**—The rule which permits plaintiff to recover damages against a municipality or a quasi-public corporation for taking away lateral support from his land applies to land in its natural state unincumbered by buildings or other structures. If it can be shown that the land would not have fallen except for the additional weight thereon of buildings, the general rule is that plaintiff cannot recover for the loss or injury to the buildings, if defendant has not been negligent in making his excavations.[18] The landowner's rights to light and air from adjacent streets are of a kin-

[16] The same rule was adopted in Elgin v. Eaton, 83 Ill. 535; in Henderson v. McClain, 102 Ky. 402; in Hartshorn v. Worcester County, 113 Mass. 111; in Cabot v. Kingman, 166 Mass. 403; in Nichols v. Duluth, 40 Minn. 389, 12 Am. St. Rep. 743; in Stearns v. Richmond, 88 Va. 992, 29 Am. St. Rep. 758; in Cincinnati v. Penny, 21 O. St. 499, 8 Am. Rep. 73, and in other numerous cases.

[17] 38 O. St. 141.

[18] Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; Gilmore v. Driscoll, 122 Mass. 199, 23 Am. Rep. 321; Keating v. Cincinnati, 38 O. St. 141.

dred nature to his right to lateral support but the rules of law relating to these rights differ materially from those governing the right to lateral support.[19]

82. **Conclusions as stated.**—The following rules, then, relating to lateral support seem to be well established:

(1) That lateral support is a right which a landowner has, to have his land in its natural state, sustained by the adjacent land. (2) That it is a right of property naturally and necessarily incident to the soil, held by the same title as the land, which can only be taken from the owner upon the same conditions and by the same processes as the land itself. (3) That those constitutional provisions which prohibit the taking of private property for public purposes except upon making full compensation therefor, apply to the right of lateral support and prevent its being taken for public purposes by municipalities or by quasi-public corporations having the power of eminent domain, unless full compensation for its value is made to the owner. (4) That a legislative act authorizing lateral support to be taken for a private purpose or to be taken without compensation should be held void because unconstitutional.

[19] Adams v. Chicago, Burlington & Northern Ry. Co., 39 Minn. 286; Barnett v. Johnson, 15 N. J. Eq. 481; Dill v. Board of Education, 47 N. J. Eq. 421.

CHAPTER XI.

COUNSEL FEES AND EXPENSES OF LITIGATION.

83. **Taxed costs.**—The general rule relating to expense of litigation is that the losing party shall be held responsible for what is usually termed taxed costs, which means the costs of the court officers for all services rendered by them in the case, the cost of witnesses, and sometimes the cost of a special commissioner appointed to obtain the facts in the case for the court. Any costs outside of such general costs, such as fees for the counsel of the opposing party, are unusual, although under certain circumstances they are proper and should be allowed.

84. **When counsel fees allowed—Warranty and indemnity.**—It is clear that in an action for breach of warranty where the grantee has been required to defend a suit for eviction, which resulted in the loss to him of the property which defendant had by warranty deed conveyed to him, the grantee may recover from his grantor the costs expended by him in such litigation together with reasonable attorney's fees paid by him in the eviction suit.

This the contract of warranty is intended to cover.[20]

85. **Notice to defend suit.**—It is sometimes held that grantee may not recover counsel fees so paid

[20] Ryerson v. Chapman, 66 Me. 557; Seitz v. People's Saving's Bank, 140 Mich. 106.

in former litigation unless the grantor was notified of such litigation and required to come in and defend it.[21] But the purpose of giving the grantor notice of the ejectment suit, is that he may have an opportunity to come into court and make such defense as he may deem proper. Should the grantor undertake to do this, the grantee is under no obligation to incur costs and expenses in such litigation, but should the grantee do so, without the request of the grantor, the grantee alone will be responsible therefor. Should the grantee fail to give notice of such litigation, it would seem that he may nevertheless be entitled to recover from his grantor reasonable expenses paid by him in such litigation, but it would be incumbent on him not only to show that such expense had actually been paid but that it was reasonable.[22]

Upon the same principle plaintiff may recover reasonable costs and attorney's fees in covenants of indemnity. Such covenants are usually found in indemnity bonds given to officers, as in case of a bond executed to a sheriff to induce him to give up property in his possession to which different persons were asserting adverse claims.[23] In Ryerson v. Chapman,[24] supra, the court said: "If the grantor has notice of the former suit and an opportunity to defend, then, in the absence of fraud or collusion, the judgment in the former suit is conclusive against him. But we do not think it reasonable that a grantor should be required to prove that a judgment

[21] Charman v. Tatum, 166 N. Y. 605; Wiggins v. Pender, 132 N. C. 628.
[22] Cullity v. Dorffel, 18 Wash. 122, 50 P. 932; Lunt v. Wrenn, 113 Ill. 168.
[23] Graves v. Moore, 58 Cal. 435.
[24] 66 Me. 557.

was wrongfully recovered against his grantee, when he had no notice to be on hand."

So when the plaintiff failed to give notice, and still undertakes to recover costs and expenses paid in such litigation, it is incumbent upon him to prove the necessity and reasonableness of such costs. It should be observed that the costs which plaintiff is entitled to recover are those incurred because of a breach of defendant's warranty. He could not recover attorney's fees paid in the action against defendant for these costs, as here the ordinary rule of recovering only taxable costs would apply.[25]

Counsel fees are not regarded as an element of damages which ordinarily may be recovered for a breach of contract.[26]

86. **Counsel fees in other causes of action.**—It has been held that attorney's fees paid by a surety may be recovered in an action for contribution against his cosurety.[27]

The same rule applies in an action to recover indemnity against a principal, where it seems reasonable for the surety to make a defense. So where defendant wrongfully attaches plaintiff's property plaintiff's counsel fees in the attachment suit are a proper element of damages against defendant.[28]

Generally, where plaintiff is secondarily liable, as between plaintiff and defendant, and is subjected to litigation in such matters which it is defendant's

[25] Westfield v. Mayo, 122 Mass. 100.

[26] White River L. & W. Ry. Co. v. Star Ranch & Land Co., 77 Ark. 128, 91 S. W. Rep. 14.

[27] Boutin v. Etsell, 110 Wis. 276.

[28] Treprille v. McAfee, 60 Ky. 34; Swift v. Plessner, 39 Mich. 178.

duty to care for because he will ultimately be liable, plaintiff may recover from defendant his costs and reasonable attorney's fees therein. So they may be recovered where a principal has been required to defend litigation on account of the wrongful act of his agent or servant. Or where a municipality is sued for an injury caused by a defect in the street wrongfully made by the adjacent property owner, all costs and expenses reasonably made in such litigation may be recovered from the property owner. The rule in such cases is stated generally to be that where a party is required to defend owing to the wrongful acts of another, against whom he has a remedy over, and defends, not on account of his own wrong but solely because of the wrong of such other person, who having been notified fails to defend, plaintiff may recover for all the reasonable and necessary expense incurred.[29]

87. **Counsel fees in tort actions.**—There is conflict of authority on the question whether plaintiff in an action of tort against defendant may recover his counsel fees in that case. Apparently on the same ground that exemplary damages may be assessed against defendant some courts have also allowed plaintiff to recover his attorney's fees as part of his damages. In a sense the attorney's fees might be regarded as compensatory damages, since plaintiff to conduct the action against defendant was required to incur this expense, but the courts appear, generally, to allow attorney's fees only in such cases as those in which punitive damages may be allowed,

[29] Westfield v. Mayo, 122 Mass. 100.

and hence appear to regard the allowance of such damages as in the nature of a punishment for defendant's willfulness in the matter.

Peckham Iron Co. v. Harper was an action against defendant for falsely obtaining possession of his principal's goods and converting them to his own use. There the court seemed to hold to this rule in saying: "We think that where an agent by false and fraudulent representations to his principal obtains possession of his principal's goods and converts them to his own use, exemplary damages may be allowed; and in such a case, the jury in estimating the damages, may include the plaintiff's reasonable counsel fees as an item of compensation."[30] But it is unreasonable to make the allowance of attorney's fees turn upon the willfulness of defendant.

In Fairbanks v. Witter and Finney v. Smith,[31] the question whether attorney's fees in cases of tort are allowed as compensatory or as punitive damages, was fully discussed and the conclusion seems to have been reached that while they may be given only in those classes of torts where punitive damages may be assessed, they are nevertheless to be regarded as compensatory and not as exemplary damages. This peculiar situation, which exists relative to the allowance of attorney's fees as damages, is a strong argument against the rule of law which permits such an allowance. It seems quite illogical, and probably originated with the idea of permitting plaintiff to recover for punitive damages, notwithstanding the

[30] 41 O. St. 100.
[31] Fairbanks v. Witter, 18 Wis. 287; Finney v. Smith, 31 O. St. 529.

fact that when courts now give plaintiff this advantage they call it compensation.[32]

The rule which authorizes the jury in tort actions to take into consideration and to allow as part of the damages plaintiff's attorney's fees seems not to be founded on any sound basis. Many of the courts have repudiated it, and it seems destined to be abandoned by them all.

The court in Day v. Woodworth[33] very properly observed that where a rule of law exists allowing the jury to find costs in the shape of counsel fees in favor of the plaintiff, they should be permitted to do the same for the defendant when he succeeds in his defense, in order that the parties may be permitted to contend in an equal field.[34] Numerous courts have decided against the allowance of attorney's fees as damages in such cases. In Winkler v. Roeder,[35] the court said: "Damages being compensatory and not vindictive, we know of no rule that would require the allowance of attorney's fees in an action of tort and deny the same in an action on contract."[36]

In Earl v. Tupper,[37] the court said: "The great weight of authority seems to be opposed to the allowance of counsel fees and other expenses of litigation, beyond taxable costs as an element of damages, even in cases where exemplary damages are proper."[38]

[32] But see The United Power Co. v. Matheny, 81 O. St. 204, on this subject.

[33] 13 How. 363 (U. S.), LEADING ILLUSTRATIVE CASES.

[34] Barnard v. Poor, 21 Pick. 378; Lincoln v. Saratoga, etc., Railroad, 23 Wend. 425.

[35] 23 Neb. 706, 8 Am. St. Rep. 155.

[36] Howell v. Scoggins, 48 Cal. 355.

[37] 45 Vt. 275.

[38] Hoadley v. Watson, 45 Vt. 289; Henry v. Davis, 123 Mass. 345.

88. **Malicious prosecution and false imprisonment.**—Where plaintiff sues for damages for false imprisonment or malicious prosecution by defendant in a former proceeding, evidence of all expense and attorney's fees paid by plaintiff in defending such previous litigation is admissible as compensatory damages.[39]

[39] Zeigler v. Powell, 54 Ind. 173; Krug v. Ward, 77 Ill. 603.

CHAPTER XII.

DAMAGES WHERE PROPERTY IS SEVERED FROM REALTY.

89. **Value of property attached to the land.**—The authorities which discuss plaintiff's measure of damages where his property has been wrongfully severed from the soil and converted, are not uniform. The question arises most frequently where coal has been wrongfully mined on the property of another, or where timber has been cut and removed without the right to do so. If the sole purpose of damages is compensation for the injury done, it would seem that it should not be difficult to formulate a rule upon which courts could agree. But so many elements enter into the question that it is by no means an easy matter to establish a rule on which all will unite. If plaintiff is permitted to recover the value of the coal or timber in its original condition attached to the soil, together with whatever damage defendant may have caused to the land, the parties would seem thus to be put in a just relation regarding the matter, and some courts have adopted this rule.[40]

Wherever this rule is adopted the damages may be shown by evidence of the value of the land before

[40] Forsyth v. Wells, 41 Pa. St. 291; Irwin v. Nolde, 176 Pa. St. 594; Coal Creek M. & M. Co. v. Moses, 15 Lea. 300, 54 Am. R. 415; Chamberlain v. Collinson, 45 Ia. 429.

and after the removal of the coal or timber. Or if the correct result is more readily reached in that way, damages may be determined by showing the value of the coal or timber, fixed to the soil.[41]

90. **Value when converted.**—Many of the courts, however, have adopted a more liberal rule toward plaintiff on the theory that the property still belonged to him after the severance, and that it could not be converted while realty, and that defendant should be held responsible for its value at the time he converted it, regardless of the value of the labor in severing it from the soil. In Ivy Coal & C. Co. v. Alabama Coal & C. Co.[42] the court said: "It is to our minds wholly illogical to say to a plaintiff in such a case that the property was wholly his, that it was the same value to him as if he had himself dug it from the earth or purchased it from its owner, and that in actions of trover the whole theory of the law is to give to the owner at least the value of his property that has been converted, yet because the defendant has committed the wrong of digging out this coal, his further wrong of converting it to his own use shall operate to deprive the plaintiff of the value of his coal." The court held plaintiff's damage to be the value of the coal as it lay in the mine, immediately after the severance from the realty, with no deduction for the value of defendant's labor in effecting the severance.

[41] Ayres v. Hubbard, 71 Mich. 594; Chipman v. Hibberd, 6 Cal. 162.

[42] 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46. This rule is adopted in a number of the states and seems to be growing in popularity. Cheeney v. Nebraska & C. S. Co., 41 Fed. 740; Donovan v. Consolidated Coal Co., 187 Ill. 28, 79 Am. St. Rep. 206; Franklin Coal Co. v. McMillan, 49 Md. 549, 43 Am. St. Rep. 560.

91. **Willful taking by defendant.**—But the question is sometimes complicated with the additional inquiry of whether defendant's willful taking of the property should add to the amount of damages plaintiff may recover from him. Leaving out of view the rule of exemplary damages, many courts hold that if defendant willfully took the property, this fact entitles plaintiff to recover the full value of the property, deducting nothing for plaintiff's labor thereon.[43] In Ellis v. Wire the defendant forcibly took possession of plaintiff's wheat as it stood in the field, and harvested it and sold it. The defendant was held for its value at the time he sold it. He was not permitted to prove the value of his labor in harvesting and threshing the crop, for the purpose of reducing the damages.[44]

92. **Liability of purchaser from trespasser.**—It is also generally held that a purchaser from a trespasser may be required to respond to plaintiff for an amount equal to what the trespasser himself would have been required to pay for conversion of plaintiff's property. If the trespasser, being innocent, can reduce the damages by showing the value of his labor on the property, this evidence is also admissible on behalf of the purchaser. But if the trespass was willful, then the evidence is excluded, on the ground that the purchaser has taken the place of the trespasser in relation to the goods.

[43] Powers v. Tilly, 87 Me. 34, 47 Am. St. Rep. 304; Wooden Ware Co. v. United States, 106 U. S. 432; Tuttle v. White, 46 Mich. 485, 41 Am. Rep. 175; Nesbitt v. St. Paul Lumber Co., 21 Minn. 491; Parker v. Waycross, etc., R. R. Co., 81 Ga. 387; Baker v. Wheeler & Martin, 8 Wend. 505, 24 Am. Dec. 66 and note.

[44] 33 Ind. 127.

In Central Coal & Coke Co. v. John Henry Shoe Co.[45] the court said: "The evidence makes out a very clear case of willful trespass on the part of Less & Watkins, from whom defendant purchased ties. Less & Watkins had notice that the land from which the ties were cut belonged to the plaintiffs and yet, without permission or authority from them, entered upon it with a large force of men, and cut the timber and converted it into ties. Under these circumstances, it is clear that, being willful trespassers, they were liable to the plaintiffs for the full value of the ties at the time of the sale and conversion, and had they been sued, would have been entitled to no reduction on account of labor and expense. The rule would have been different had they been innocent of intentional wrong."

93. **Value at time of purchase by innocent purchaser.**—So in Powers v. Tilly[46] the court held that the owner of land from which trees had been cut by a willful trespasser and sold to defendant, an innocent purchaser, after they were manufactured into ties, could recover from the innocent purchaser the value of the ties at the time they were purchased without any reduction for the value of the labor put upon the timber by the willful trespasser.

The rule that the owner of property thus tortiously taken may recover from the innocent purchaser the full value of the property at the time of the purchase is established by an almost unanimous course of decision. It would seem, however, that

[45] 63 S. W. 49, 69 Ark. 302.
[46] 87 Me. 34, 47 Am. St. Rep. 304.

if the innocent purchaser enhanced the value of the property after it came into his possession he should be entitled to show this in reduction of damages. This view seems to be sustained by the leading case of Silsbury v. McCoon.[47]

In Railway Company v. Hutchins a different rule relating to damages against an innocent purchaser of such property, was adopted by the court. The evidence showed that the railway company innocently purchased ties and wood from willful trespassers, who had manufactured the timber from the trees cut from plaintiff's land, thereby greatly enhancing its value.[48]

The court held that since the defendant was innocent, only the value of the timber as originally taken could be recovered from it, though the willful wrongdoers would not have been allowed anything for their services.

94. **Replevin of property on which labor has been done.**—In many of the cases above referred to the courts have discussed the right of plaintiff to retake at any time, and from any person in possession of it, property taken wrongfully from his land. It is held by all the courts that the trespasser can get no title as against the owner of property which he wrongfully takes from the owner, although he, by his labor thereon, greatly enhances its value. Hence it is held that the property may at any time be taken in replevin so long as the owner can identify it as his own.

[47] 3 N. Y. 379.

[48] 32 O. St. 571. This case seems to stand alone on this proposition.

In Single v. Schneider,[49] referring to this point, the court said: "It is generally recognized that a wrongdoer cannot by changing the form of another's property, change the title. The owner may pursue it and reclaim it specifically by whatever remedy the law gives him for that purpose. If he gets it, it is his." It is important, then, for plaintiff to determine by what process he will seek to reimburse himself in cases of this character, as he may secure much more, in a certain case, by replevin than in action of trover.

[49] 24 Wis. 299, LEADING ILLUSTRATIVE CASES.

CHAPTER XIII.

DAMAGES WHERE OWNER HAS A LIMITED INTEREST.

95. **Where there is more than one owner interested.**—Property injured or converted may be owned by more than one person, or various persons may have different interests in the injured property. Interesting questions arise in such cases.

It is certain that the wrongdoer should not be required to respond for his wrong in a greater amount because of the fact that title to the property is held by a number of persons. The question has perhaps arisen most frequently where property is injured while rightfully in possession of one who is not the owner, such as a bailee, a trustee, or a pledgee. Possession of this character creates a special interest in the property, and it is generally held to give the right to collect from the wrongdoer the full value of the property converted or destroyed. This is on the theory that either the owner or the one rightfully in possession is entitled to bring an action for damages and since the latter may sue the wrongdoer it is proper for him to collect full damages for the injury in one action. He will then be required to respond to the owner for any amount recovered beyond his own interest in the property.[50]

Thus, in Armory v. Delamirie a chimney sweeper's

[50] Baker v. Hart, 52 Hun 363; Freeman v. Underwood, 66 Me. 229.

boy found a jewel which he showed to the defendant, a goldsmith, in order to learn its value, the goldsmith refused to return the jewel to the plaintiff, whereupon he sued for its full value. It was insisted that he should not be permitted to recover the entire value of the jewel because he was only the finder, and therefore not the owner, but the court held that he had a special property in it sufficient to enable him to recover for its entire value.[51] On the other hand, if the owner should sue instead of the one who was in possession he could recover the full amount and would then be required to respond to the bailee for his interest in the amount recovered.[52]

Where property was injured while in possession of bailee it was held in Brewster v. Warner that bailee could recover full damages for the injury although he had only a special interest in the case, and it was held to be of no importance whether or not the bailee was liable by reason of the injury to the goods to respond to the owner. It was held that his right to recover from the wrongdoer was based upon his rightful possession of the goods at the time and not upon his duty to respond for another's wrong to the goods.[53]

96. **Mortgaged property.**—This question has also arisen in cases of injury to property on which there are a number of mortgages. In such cases any one of the mortgagees may sustain an action against the wrongdoer for injury to the property and when the fund is collected it should be distributed to the lien-

[51] 1 Strange 505 (Eng.).
[52] Eisendrath v. Knauer, 64 Ill. 396.
[53] 136 Mass. 57, LEADING ILLUSTRATIVE CASES.

holders in accordance with their priority; so that if the second mortgagee should recover damages for injury to or loss of the property the court would require him first to consider the interest of the first mortgagee before applying the fund in payment of his own mortgage.[54] He would hold the funds thus secured, as trustee for all persons having prior liens, and could secure no advantage over them by his action.

[54] Fowler v. Gilman, 13 Met. 267; Jackson v. Turrell, 39 N. J. L. 329.

CHAPTER XIV.

BREACH OF WARRANTY.

97. **Breach of warranty of chattel.**—Warranty contracts are common, relating to sales of both real and personal property. In sales of chattels the warranty is made to apply to the quality as well as to the title. The rules governing the measure of damages for a breach of warranty of title and of quality are the same in principle. If the quality of the chattel is not as warranted plaintiff may recover as damages the difference between the value of the chattel with its defects, and its value if it had been as warranted. In Cary v. Gruman,[55] action was begun for breach of warranty of soundness on the sale of a horse. Defendant contended that the measure of damages was the difference between the price paid for the horse and its value with the defects. But the court held that a warranty on the sale of a chattel is, in legal effect, a promise that the thing sold corresponds with the warranty in title, soundness, or other quality to which it relates, and refused to adopt the rule contended for by defendant. The difference between the horse with his defects and what he would have been worth if sound as warranted was said to be a better rule because it gives to the plaintiff the value of his bargain. This is the rule generally adopted by the courts.

[55] 4 Hill 625 (N. Y.).

This rule was applied in Hoffman v. Chamberlain[56] to a breach of warranty of title. Plaintiff in that case, it was shown, had bought of defendant certain Baltimore heaters, together with other property. Title failed to three of the heaters and the question of the measure of damages was important, as there was no separate price fixed for the heaters. The rule adopted was that where there is a failure of title to a part of the property the measure of damages is the loss sustained by the plaintiff, which is the difference between the value of the property as conveyed and its value, had the title been as warranted.

These cases present the rule on this subject which is most just to the parties to the warranty contract.

98. **Difference between price and value of article.** —But there are a few cases where courts have adopted a different measure of damages based upon the idea that if plaintiff is placed in as good condition after the breach of warranty as before, this should be satisfactory. This rule permits plaintiff to recover only the difference between the price paid for the article and its actual value. The value of the warranty that the chattel was in better condition than it in fact turned out to be, is overlooked, although this may have been the prime motive of plaintiff in securing such warranty.

Thus it was held in Mining Co. v. Jones,[57] that the legal measure of damages against defendant for having furnished plaintiff a grade of ore inferior to that

[56] 40 N. J. Eq. 663.
[57] 108 Pa. St. 55.

mentioned in his contract of warranty was the difference between the contract price of the ore and what the ore as furnished was worth in the market. It is probable, however, that no court would now, in view of the overwhelming authority favoring the difference between the actual value and the value as warranted, adopt a different rule. There seems to be no valid reason why one who has entered into a contract of warranty that an article is of a certain quality should not have damages in case of breach of this contract for whatever loss he has sustained by the breach, which must necessarily equal the value of his contract, or what he would have gained if the property had been as warranted.

This is the rule adopted generally by the courts, where one has been induced to purchase property of another upon his false representations of its value or quality or title. In Morse v. Hutchins,[58] in an action for deceit where it was alleged that plaintiff had bought certain property of defendant based upon his false representations of its value, the court said: "It is now well settled that, in actions for deceit or breach of warranty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented or warranted to be." The court held that to adopt the rule giving plaintiff only the difference between the price and the value of the property would be unfair to plaintiff and offer an inducement to defendant to break his warranty contract.

[58] 102 Mass. 439, LEADING ILLUSTRATIVE CASES.

99. **Breach of warranty of title to land.**—There was formerly a decided division of opinion relating to the proper measure of damages on breach of warranty of title to land. It was strongly contended that plaintiff who had been compelled to yield possession under a superior title, held by a stranger, was entitled to recover the value of the land at the time of his eviction, however remote that might be from the date of his purchase. It was insisted, with much reason, that only in this way could he have the full benefit of his bargain, since he would not have lost the land had the title been as warranted. This theory was early adopted in the New England states, taken doubtless from the English rule on the subject which permits plaintiff to recover the full value of the land at the time of his eviction therefrom. Thus in Gore v. Brazier,[59] where defendant was sued upon a breach of his covenant of warranty, the court held that plaintiff was entitled to damages equal to the estate at the time of eviction. Parson, C.J., in delivering the opinion said: "The court are of opinion, conformably to the principles of law applied to personal actions of covenant broken, to the ancient usages of the state, and to the decisions of our predecessors, supported by the practice of the legislature, that the plaintiff in this action ought to recover in damages the value of the estate at the time of the eviction."

100. **A dangerous rule.**—The danger in this rule was frequently emphasized and discussed by the courts. It was shown that one who had sold a city

[59] 3 Mass. 523, 3 Am. Dec. 182.

lot for an insignificant amount, and had warranted the title, might within a few years find his fortune swept away in damages under this rule, should his title fail. The great enhancement in value of much property in numerous cities, caused solely by the rapid improvement and growth of such communities, caused the courts to hesitate in the adoption of the rule, and so to modify it that this heavy burden would not fall upon the warrantor of title. And now in all the states outside of New England the measure of damages in such cases is the purchase price paid for the land including interest and the cost and expenses of litigation in the ejectment proceedings. The question of the value of improvements is generally settled by what are known as Betterment Statutes, which ordinarily require the true owner to pay for them on securing from the occupant the possession of his land.

A clear discussion of this question will be found in the early New York case of Staats v. Ten Eyck,[60] where Chief Justice Kent in refusing to follow the New England doctrine said that under it "no man could venture to sell an acre of ground to a wealthy purchaser without the hazard of absolute ruin."[61]

101. **Partial eviction.**—If plaintiff has lost title to only a portion of the estate purchased and has been ousted from only that portion, his damages will be measured by the value of the portion lost unless special damages can be shown. In such partial loss the damages will bear the proportion to the whole

[60] 3 Caines 111 (N. Y.).

[61] Philips v. Reichert, 17 Ind. 120; Clark v. Parr, 14 Ohio 118; McInnis v. Lyman, 62 Wis. 191.

consideration paid as the portion lost in value bears to the whole quantity purchased.[62] So if the grantee purchases of a stranger a valid superior title he may recover of his grantor the amount he paid for such outstanding title, not exceeding the price paid originally to his grantor.[63]

102. **Remote vendee may recover.**—Since the warranty of title runs with the land a grantee is not limited in his right of action for loss of title, to his immediate warrantor, but may sue any prior warrantor who has conveyed the land. Should he sue a remote grantor, the measure of plaintiff's damage, then, presents an interesting question. Is his recovery limited by the amount paid to the remote grantor as purchase money, or by the amount which plaintiff paid for the land to his own grantor? This question was fully presented in Brooks v. Black,[64] where the court held that the obligation of the covenantor is the same to a remote grantee that it is to his immediate grantee, and that the measure of damages for a breach of the covenant of warranty in an action by a remote grantee is the amount received as purchase money for the land by the remote grantor.

The cases are there collected and commented upon, and it is shown that where the question has been decided, the states are about equally divided in their views. Some of them hold that plaintiff in such case should recover as damages only the amount he had paid to his grantor, the others holding plain-

[62] Long v. Sinclair, 40 Mich. 569; Whitzman v. Hirsh, 87 Tenn. 513.
[63] Royer v. Foster, 62 Ia. 321.
[64] 68 Miss. 161, 24 Am. St. Rep. 259, LEADING ILLUSTRATIVE CASES.

tiff limited by what defendant, the remote grantor, had received.

BIBLIOGRAPHY.

The recent development of the subject of Damages has produced a number of treatises on the subject, the most important and complete of which are the Ninth Edition of *Sedgwick,* in four volumes, 1912, and the Third Edition of *Sutherland,* four volumes, 1903. Other publications on the subject are as follows: *Beale,* Cases on Damages (2nd ed.), 1909; *Cooley,* Cases on Damages, hornbook series, 1913; *Hale,* hornbook series, 1912; *Harris* on Damages by Corporations (2 vols.), 1892; *Joyce* (3 vols.), 1903; *Mechem,* Cases (3rd ed.), 1902; *Mechem and Gilbert's* Cases on Damages, 1909; *Russell,* Cases on Damages, 1909; *Sedgwick,* Elements of Damages, 1909; *Voorhees* on the Law of Damages for Personal Injuries, 1907; *Watson* on Damages for Personal Injuries, 1901; *Willis* on Damages, 1910.

The student who desires to make a thorough examination of this subject should not overlook the various digests and encyclopedias which give complete citations of cases and notes where ample discussions of the subject may be found.

LAW OF INSURANCE

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PART I

INTRODUCTION

CHAPTER I.

THEORY, HISTORY AND SIGNIFICANCE.

1. **Theory.**—A thousand able-bodied men, with no means of support except their salaries, may be confronted with this question, What would become of our families if we should die tomorrow? One of their number may assure them that, through careful study and observation for twenty-five years, he is reasonably certain that three of them will die within the next twelve months, but that no one knows which three, and that the three prospective widows may be kept from the poorhouse if they each receive $1,000 upon their husbands' deaths.

Obviously, there is but one thing to do. Let each man contribute three dollars to a common fund with the understanding that each of the three widows is to have one-third of the total. Thus they would bear each other's burdens and so fulfill the law of

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the Master. Surely, the fact that this is done in a scientific and exact manner in no wise detracts from its high religious and ethical value. An eminent divine, T. De Witt Talmadge, was so overcome with the religious aspects of life insurance that he preached it from the pulpit.

2. **History.**—There is but slight evidence of the existence of insurance before the Middle Ages. However, in the thirteenth century, insurance made its way into the commerce of Europe through the energy of Italian merchants, appeared in England along with negotiable instruments and was controlled by the same body of law, the law merchant.

Hand in hand, the law of negotiable instruments and insurance law made inroads into the English common law. Both were first administered by separate courts with jurisdiction limited to disputes between merchants; both were accepted finally in the eighteenth century as parts of the common law and were administered thereafter by the ordinary common law courts.

As we might expect, marine insurance is the oldest. Then followed the birth of fire insurance in England in the latter part of the seventeenth century, though, strange as it may seem to us, it was viewed with such suspicion and so discouraged by taxation that it did not become extensive until after 1869. Life insurance followed soon after fire insurance and became widespread only when fire insurance did, in the latter half of the nineteenth century.

In the United States fire and life insurance became extensive at the same time as in England. How-

ever, marine insurance is still of comparatively slight importance here for the simple reason that we have so little need for such insurance.

The most striking characteristic of the insurance business in this country is the aggressive campaign of life insurance agents or solicitors. Perhaps no other business in the world has been built up and maintained to such an extent by unremitting personal solicitation and appeal. These methods, it is contended, are of priceless value in educating the public in the blessings of thrift and provision for the future. Fire insurance companies do not have to do business in this way, since, after much antipathy in and out of governmental circles, opposition to the existence of fire insurance has died out completely. Today it is asserted that American life insurance, if not our greatest industry, when measured by the amount of money involved, is second only to the railroads. However, it is difficult to prove such assertions.

The future of insurance is more fascinating than its past. As fast as the statistics can be gathered and tabulated new forms of insurance are springing up. To say nothing of the infinite forms of life insurance policies made possible through the collection of data and the application of mathematics, we have today, among others: fidelity, accident, health, burglary, employers' liability, automobile liability, credit indemnity, fly wheel, plate glass, automatic sprinkler leakage, steam boiler, real estate title, tornado, wind, hail, flood, lightning and strike insurance.

3. **Economic significance.**—A large proportion of murders and from fifteen to fifty per cent of our fire losses would not occur but for the fact that the life and fire insurance exists. Nevertheless, the advantages of these forms of insurance so completely outweigh the disadvantages that no sane person would argue in favor of their extinction.

However, opposition has arisen, for obvious reasons, to certain forms of insurance, for example, the insurance of the lives of children of tender years, completely under the control of their parents, particularly when insured in favor of those in custody of them for a sum greater than funeral expenses.

4. **Insurance as a separate legal study.**—A knowledge of the law of agency and contracts is an essential prerequisite to a course in insurance law for the same reason that such knowledge is necessary in the study of carriers or corporations. However, one who knows only the fundamental principles of agency and contracts knows no more, and no less, about the problems of insurance than he does about carriers and corporations.

With our industrial development, the course of study in our law schools must change to some extent. The law in relation to automobiles may soon form part of the regular law school course. Then, if the government takes over the business of carriage and insurance, these subjects may be dropped as fundamental courses. Until such changes occur, however, a knowledge of the law of insurance will remain as a desirable part of legal education.

PART II

FUNDAMENTAL PRINCIPLES

CHAPTER II.

INSURABLE INTEREST.

5. **Necessity of insurable interest.**—Should X be permitted to insure the house or life of S, a perfect stranger who is not X's landlord nor in any way connected with X by blood, marriage or business association? Clearly not. Should X desire such insurance it is only too probable that he intends to commit arson, murder, or both. Therefore, the law forbids one to insure the property or life of another unless there is a reasonable expectation that the former in his position desires that the loss shall not occur, or that it shall be put off as long as possible in the case of life insurance. Nevertheless, as fundamental as this requirement of insurable interest may appear, statutes[1] had to be passed in England to put a stop to the practice of insurance by persons not possessed of insurable interest in the life or property insured. Thus, by statute in England, "interest or no interest" policies became illegal. Blackstone regards such contracts as voidable on the ground that they are wagering contracts.

[1] 19 Geo. II. c. 37 (1746); 14 Geo. III. c. 48 (1774).

Possibly, the earlier English decisions held an insurable interest to be necessary and at first the phrase "interest or no interest" may have been designed merely to cast the burden of proving a want of interest on the insurer, and furthermore the statutory changes may have destroyed merely an unfortunate perversion of the original common law rule.[2] At all events, in the United States, irrespective of statute, an insurable interest is requisite, except in New Jersey, where the rule is still doubtful.[3]

6. **Insurable interest in property.**—The same principles in regard to insurable interest determine the validity of fire and marine insurance contracts. Therefore the two should not be separated in our present discussion.

Insurable interest and ownership must not be confused. Though it is true that either legal or equitable ownership is sufficient to give the owner an insurable interest in the property, much less than this will suffice. On the other hand, one may be almost mathematically certain that he will soon be the owner of property and yet have no insurable interest. The line is drawn between interest and no interest for insurance purposes in a very different manner from the mode adopted in the law of property in determining when one has a property interest in a thing. However, we may say that insurance follows the law in many cases. For example, real property is devised to A for life, remainder to B in

[2] Lord Eldon in Lucena v. Craufurd, 2 Bos. & P. N. R. 269 (Eng.); Conn. Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 460.

[3] Meyers v. Schumann, 54 N. J. Eq. 414, 34 Atl. 1066.

case A dies without issue. Though A has twenty healthy children and B is ninety years of age and on his deathbed, B has an insurable interest in the property, because he has a legal interest in it. On the other hand, the only son and prospective heir of an aged insane man who cannot and has not made a will cannot insure his father's homestead, because he has no present legal right to the property.[4] There is but one way out for this son; on being appointed guardian for his father, he may insure his father's interest.

Owner of legal title. The owner of property at law has an insurable interest in the same even though he has but a naked legal title, as in the case of a trustee. However, if he is but a trustee he will hold the money received from the insurance company in case of loss subject to the same trusts as the property destroyed, since otherwise the trustee would be encouraged to commit arson.

Among other legal owners, an assignee for the benefit of creditors may insure property coming to him as assignee.[5] An administrator has been held to have an insurable interest in the real property of the deceased, at least when the personal property is insufficient to pay debts.[6] But suppose that the administrator insures the lands of an intestate at a time when it is doubtful whether or not the personalty will be sufficient to pay the debts. Probably the court would hold that there is an insurable in-

[4] Lucena v. Craufurd, 2 Bos. & P. N. R. 269, 324 (Eng.).

[5] Sibley v. Prescott Ins. Co., 57 Mich. 14, 23 N. W. 473, LEADING ILLUSTRATIVE CASES.

[6] Sheppard v. Peabody Ins. Co., 21 W. Va. 368.

terest until it is definitely ascertained that the personalty will be sufficient to satisfy creditors.

Moreover, the owner of land to which a church building has been permanently annexed may insure the structure, though bound to convey to the church society upon certain conditions.[7]

Claimant in equity. One having a property interest enforcible in a court of equity has an insurable interest in such property. Take, for example, a mortgagor's interest, which is but equitable today in many states and was purely equitable at common law. The mortgagor may insure the property even though it is mortgaged to its full value[8] and even though, by statute, the mortgagor is excused from personal liability for the debt.[9] This is true for the reason that the mortgagor relies upon the property as the means with which to pay.

Furthermore, a mortgagor continues to have an insurable interest until after the time for redemption has expired. Even though the right to redeem has been seized upon execution, the mortgagor retains an insurable interest, if he can still redeem notwithstanding the seizure.[10] However, if the right to redeem has expired, the mortgagor cannot recover for a subsequent loss, even though the mortgagee has promised to allow payment and redemption, if the mortgagee's promise cannot be enforced because of want of consideration.[11]

[7] Oakman v. Dorchester Mut. Fire Ins. Co., 98 Mass. 57.
[8] Higginson v. Dall, 13 Mass. 96.
[9] Royal Ins. Co. v. Stinson, 103 U. S. 25, 29.
[10] Strong v. Manufacturers' Ins. Co., 10 Pick. 40 (Mass.).
[11] Pope v. Glens Falls Ins. Co., 136 Ala. 670, 34 South. 29.

Lien holders. The holder of a specific lien upon property has an insurable interest in such property.[12] But, suppose that the lien is not specific but general. Take, for example, the case of a judgment creditor whose lien attaches to all the debtor's real estate within the county. It has been held that such a lien holder has no insurable interest, on the ground that he "is not interested in the property as property, but only in his lien."[13] However, the lien is the one interest with which any lien holder is concerned. The fact, then, that a general lien holder's lien is more extensive than that of a special lien holder should not deprive him of his right to insure..

Where the insured fitted up a vessel with the understanding that he was to have a lien on the outfit, but completely surrendered all possession or control over the goods and thus waived his lien, it was held, very properly, that he had no lien and hence no insurable interest.[14] Obviously, whether or not a lien exists is a question of law, and merely thinking that one has a lien is not the same as having it, even for the purpose of insurance.

Creditor's interest in debtor's property. A simple contract creditor with a merely personal claim against his creditor, has no insurable interest in the debtor's property.[15] Where, however, the debtor has made an assignment for the benefit of his creditors,

[12] Briggs v. Merchant Traders' Assn., 13 Q. B. 167 (Eng.).

[13] Grevemeyer v. South. Mut. Fire Ins. Co., 62 Pa. 340, 1 Am. Rep. 420; Light v. Countrymen's, etc., Ins. Co., 169 Pa. St. 310, 32 Atl. 439.

[14] Folson v. Merchants' Mut. Mar. Ins. Co., 38 Me. 414.

[15] Creed v. Sun Fire Office, 101 Ala. 522, 23 L. R. A. 177.

or has assented to the insurance, the creditor's insurable interest has been recognized.

After the debtor has died, and it appears that his personal property is insufficient to pay his debts, the creditor may insure his debtor's real estate.[16] With the death of the debtor, all personal liability ends and the creditor acquires rights in rem which he did not possess before. And thus, when the possibility of insuring the debtor's life becomes extinct, the right to insure his property arises.

As affected by possession. If title to property has passed, but not possession, it is clear that the person receiving title may insure. If possession, but not title, has passed, the one in possession without title may insure.[17]

Executory agreements. Suppose that neither title nor possession has passed. For example, A has made an executory contract with B for the purchase of a fine race horse at a much lower figure than its real worth. Obviously, if the horse dies, A cannot sue for breach of contract, and if B becomes insolvent, A may have to share merely as a general creditor of B. Accordingly, it has been held that A may insure the horse.[18]

Profits. Ordinary fire insurance of a building used for business purposes does not entitle the insured to compensation for profits which may be lost between the time of the fire and the restoration of the build-

[16] Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, LEADING ILLUSTRATIVE CASES.

[17] Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312.

[18] Cumberland Bone Co. v. Andes Ins. Co., 64 Me. 466, LEADING ILLUSTRATIVE CASES.

ing. But suppose that the policy expressly covers profits. Must such profits, to be insurable, be of sufficient certainty to allow their recovery in an action for damages against one who tortiously causes the loss? Apparently, the English courts have leaned towards an affirmative answer to this question.[19] In the United States, however, the insured need not show that such profits were probable.[20]

Reinsurance. It is well settled today that an insurance company, itself, may insure, with another insurance company, property which it has already insured. This common practice is known as reinsurance and is resorted to when a company decides that it has more insurance than it cares to carry on a certain risk or in a certain neighborhood.

This common practice was made illegal by statute, in England, in 1746.[21] The reason given for passing such legislation was that reinsurance promoted speculation in insurance premiums. By analogy, if we would break up speculating in wheat we should make it illegal for one who has bought a bushel of wheat to resell it. The English statute proved too drastic and was repealed, but only after more than a hundred years of its existence.[22]

Insufficient interest. A turnpike company in Pennsylvania donated over five thousand dollars towards the erection of a sixteen thousand dollar county bridge, not as a matter of philanthropy, but to increase the turnpike company's dividends. It

[19] Hodgson v. Glover, 6 East 316 (Eng.).
[20] Patapsco Ins. Co. v. Coulter, 3 Pet. 222 (U. S.).
[21] 19 Geo. II., c. 37, s. 4.
[22] 27 and 28 Vict., c. 56, s. 1 (1864).

then insured the bridge, but it was held, after the bridge had been destroyed, that the company had no insurable interest.[23] The court decided the case on a principle similar to the one in torts restricting the recovery of damages for public nuisance to those who have received special damage. The court declared there "was not a right peculiar to the plaintiff."

This case is not without a sequel. The turnpike company, undaunted, proceeded to sue to recover the insurance premiums which had been duly paid. The insurance company then pleaded the Statute of Limitations and the court sustained the plea.[24]

Amount. In legal theory, the amount of insurance which one may purchase is limited only by the full value of his interest in the property. However, in practice, insurance companies generally prefer to insure property for a little less than its full value. In many states "valued policy" laws prevent the insurance companies from showing that the property was insured for more than its true value, in case of total loss, unless fraud or depreciation of the property since the insurance was effected can be shown.

7. **Same subject—Time when interest must exist.** —In the case of property insurance it is universally agreed that, as a rule, the insured must have an insurable interest in the property when the loss occurs. Furthermore, by the apparent weight of authority, such interest must also exist when the insurance is effected. However, on principle, it is

[23] New Holland Turnpike Co. v. Farmers' Mut. Ins. Co., 122 Pa. 37, 15 Atl. 563, LEADING ILLUSTRATIVE CASES.

[24] New Holland Turnpike Co. v. Farmers' Mut. Ins. Co., 144 Pa. St. 541, 22 Atl. 923.

difficult to defend this proposition and many courts and students of the question feel that an interest at the time of insurance should not be requisite. If the insured acts in good faith, there is no reason why the receipt of his fire policy a few days before the deed for his homestead is received should leave him uninsured.

To the rule, if it exists, that there must be an insurable interest when the contract of insurance is effected, the following exceptions are well settled: (1) Floating or running policies are perfectly valid. These cover, for example, constantly changing stocks of goods, or whatever machinery happens to be in a shop when the loss occurs. (2) "Lost or not lost" marine policies are valid. Such policies are used, where, for example, the insurer on June 10th agrees to insure a ship from the first of June, the time when she sailed, whether she is "lost or not lost" before the insurance was effected, if both parties know nothing of what has happened to her between the first and the tenth. Such policies are confined in practice to marine insurance. We generally have no occasion to insure a house "burned or not burned," though such cases might conceivably arise, and such insurance might be held valid.[25]

It is generally held that the insurable interest need not exist continuously from the time of insurance until the loss occurs. The insurance is merely suspended during the time when the insured has no

[25] Wales v. New York, etc., Ins. Co., 37 Minn. 106, 33 N. W. 322; and still more strangely a life was reinsured "dead or not dead" in Phila. Ins. Co. v. Washington Ins. Co., 23 Pa. St. 250; and accident was covered retrospectively in Ford v. United States, etc., Relief Co., 148 Mass. 153, 1 L. R. A. 700, 19 N. E. 169.

insurable interest and revives when he reacquires an interest.

8. **Insurable interest in lives—Distinctions between property and life insurance.**—A house may never burn but all men must die. Probably most houses never burn, but continue to stand until torn down. But though nothing is more uncertain than the time thereof, nothing is more certain than death. These fundamental facts differentiate property and life insurance.

A further axiomatic truth must be noticed. It is impossible to measure the value of any human life in terms of money. This fact probably had something to do with the common law rule forbidding recovery of damages for causing the death of another. But it is generally not difficult to determine with sufficient accuracy the value of a ship or building.

Hence, property insurance is purely a matter of indemnity, while life insurance has in it the element of investment as well as the feature of indemnity. In theory, a man can never gain through insurance by the loss of his ship or house, unless he practices fraud. But it is perfectly lawful for a woman to insure the life of a worthless husband for a million dollars. His death a few days later means a gain to her in dollars and cents of a million dollars minus the initial premium. In practice, she would have difficulty in getting so much insurance on such a person, but there is no legal obstacle barring her path.

Another difference between property and life insurance is this: The fire insurance companies gen-

erally reserve the right to cancel the policy and return the unearned portion of the premium on giving five days' notice and stipulate that the policy shall be void if the risk be materially increased. Aside from restrictions in regard to extra-hazardous pursuits, such provisions in life insurance policies would be absurd. Though one is at the point of death and can live but a few hours, he has a perfect right to tender his life insurance premium, at least those subsequent to the first, and the company cannot avoid liability by refusing to accept the premium tendered.

Thus, a life insurance policy becomes more valuable as time goes on and the probability of death increases, whereas fire insurance risks remain practically constant because there is virtually no more danger of a house burning when old than when it was first erected.

It may be asked, very properly, how can life insurance companies remain solvent if they charge the same premium each year, as many of them do, without increasing the premium as the risk increases? Such companies are safe because they receive more than enough to cover the risk while the policy holder is young and thus they discount the future.

Relationship. Practically every relationship which can exist through blood, marriage or family ties has been passed upon by the courts and it has been determined in each case, whether or not, for example, one can insure the life of his grandfather or sister-in-law. Whenever the relationship is sufficient to warrant insurance, there appears to be no legal limit

as to the amount of insurance obtainable. This is due to the impossibility of measuring affection.

There are two problems which must be solved in this connection: (1) We must determine whether or not a brother, for example, can insure his sister's life. (2) Assuming such insurance to be proper, we must ascertain if a showing of the mere relationship is sufficient to warrant the insurance, regardless of circumstances. For example, they may be miles apart and, perhaps, have never lived under the same roof.

Husband and wife. There is a presumption that a husband has an insurable interest in his wife's life, and vice versa. The husband is entitled to her services, at least at common law, and she is entitled to his support. But suppose they have been separated for years and that neither support nor services have been received since the marriage. It has been intimated that there is a conclusive presumption in all such cases, regardless of circumstances, though by the probable weight of authority no relationship, however close, will create more than a prima facie presumption of the validity of the insurance.[26]

If the parties are living together but are not legally married, insurable interest may nevertheless exist. The fact and expectation of services or support are sufficient without the right to the same.[27]

Parent and child. It has been held that a parent may insure the child's life, even though the parent

[26] Life Ins. Clearing Co. v. O'Neill, 106 Fed. 800, 802, 54 L. R. A. 225.
[27] Equitable Life Assur. Soc. v. Patterson, 41 Ga. 338, 5 Am. Rep. 535.

has released his right to a considerable share of the child's earnings.[28] Had he released his entire interest, the decision might have been against the parent.

In another instance, a son insured the life of his father. The poor law required the son to support his parents if unable to support themselves. It appeared that the son had paid his father's expenses in coming from Ireland. Now it might be argued that the son had a right to get back the passage money by insuring his father's life. But this line of reasoning is clearly erroneous. Insurance must be justified, if at all, by the possibility of loss arising from the death. According to the court, the poor law apparently gave the son no advantage. But the court saw its way out in an ingenious manner. The death of the father may make it more probable that the son will be called upon, under the poor law, to support his mother. Hence, he has an insurable interest in the life of his father.[29]

Persons in loco parentis. Persons who stand in loco parentis, that is, persons who have conducted themselves as parents by supporting or caring for others, are in the same position as parents in so far as insurable interest is concerned, even though no ties of blood or marriage are present.

Persons under engagement to marry. It is well settled that a woman under engagement to marry may insure the life of her affianced husband. If he refuses to marry her, she may recover damages. If he marries her, she is entitled to support. If he

[28] Loomis v. Eagle Life & Health Ins. Co., 6 Gray 396 (Mass.).

[29] Reserve Mutual Ins. Co. v. Kane, 81 Pa. 154, LEADING ILLUSTRATIVE CASES.

dies, though she can get neither damages nor support, she will be able to offset these, if she has insured his life, by collecting her insurance.

Commercial relationship. It is well settled that a creditor may insure the life of his debtor, a partner the life of his co-partner, a surety the life of his principal.[30] It is rumored that London shopkeepers insured the life of a sovereign about to be crowned in order to avoid loss which would result in the sale of their wares if the monarch had died before the coronation, and that lives of noted financiers have been insured by investors for business reasons. Such cases have not found their way into court as yet.

However, the creditor cannot insure the life of the debtor's wife, if he has no personal claim against her, even though the claim is enforcible against the community property.[31]

Amount of interest. For what amount can the creditor insure the debtor's life? In Pennsylvania it has been held that the creditor is "limited to the amount of the debt with interest, and the amount of the premiums with interest thereon, during the expectancy of life, as shown by the Carlisle tables."[32] The inadequacy of such a test is perceived when it is realized that the probable premiums, with interest, always exceed the amount of the policy. How else could an insurance company do business? Like every gambler, the insurance company must arrange to make a "percentage on the game." Applying the

[30] Scott v. Dickson, 108 Pa. St. 6, 56 Am. Rep. 192.

[31] Cameron v. Barcus, 31 Tex. Civ. App. 46, 71 S. W. 423.

[32] Ulrich v. Reinoehl, 143 Pa. 238, 13 L. R. A. 433, LEADING ILLUSTRATIVE CASES.

rule suggested, if A owes B a cent, B may insure A's life for a billion dollars, or even more, since the probable premiums with interest must exceed a billion dollars. Probably no more definite rule can be laid down than this: that the amount of the policy must not be greatly in excess of the debt.[33]

Interest in one's own life. Outside of Texas,[34] one may insure his own life and may designate anyone, though a perfect stranger, as his beneficiary. It is frequently said that a man always has an insurable interest in his own life. It may be urged that such insurance will tempt the favored person to kill the insured, but so does a will devising the insured's property to a stranger. The affection which generally exists in such cases is relied on to outweigh all danger of murder.

Our chief difficulty at this juncture is in determining when A has insured his own life in B's favor, and when B has insured A's life in B's favor. B may induce A to act as B's agent in effecting the insurance and without disclosing the agency, or A may supply B with funds with which to insure A's life in B's favor. It has been decided that if it appears that A took out the insurance, it is immaterial what arrangements may exist between A and B in regard to the payment of the premiums.[35]

Consent of one whose life is insured. It is held to be contrary to public policy to insure the life of a person who has not consented to the issuance of the policy. In practice such cases occur but rarely,

[33] Cammack v. Lewis, 15 Wall. 643 (U. S.).
[34] Equitable Life Assur. Soc. v. Hazlewood, 75 Tex. 338, 7 L. R. A. 217.
[35] Aetna Life Ins. Co. v. France, 94 U. S. 561.

because it is generally required that the person whose life is insured undergo a physical examination. However, in one case, a policy was issued without the person's consent and without a physical examination where the person had been examined a short time before in reference to another policy.[36] The court ordered the policy cancelled.

According to this principle, insurance issued on the life of a king or financier is invalid unless assented to by the king or financier. No exception has been recognized in the case of well-known personages, although, if this kind of insurance is issued to strangers, such consent is, in all probability, not obtained.

Furthermore, it is difficult to see where there is any consent by the one whose life is insured in the case of insurance of the lives of children of tender years, though the issuance of such insurance is a recognized industry. Perhaps the parent's consent is sufficient in such cases.

9. **Same subject—Time when interest must exist.** —An insurable interest, in life insurance, must exist at the time the policy is issued. It is entirely immaterial, in most jurisdictions, that such interest does not exist when the death occurs.

Thus, where A insured the life of her husband B, then was divorced from B who then married C, while A in the meantime became Mrs. D, it was held proper for A to keep up her payments and collect the insurance on B's death.[37]

[36] Rombach v. Piedmont Ins. Co., 35 La. Ann., 233, 48 Am. Rep. 239.

[37] Conn. Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, LEADING ILLUSTRATIVE CASES.

There are but two exceptions to this rule: (1) In certain states, a creditor who insures his debtor's life must have the insurable interest when the debtor dies.[38] (2) Certain fraternal associations make provision for payment only to persons dependent on a member of the association for support at the time of his death.[39]

[38] See, infra, chapter relating to rights of creditors.
[39] Order of Ry. Conductors v. Koster, 55 Mo. App. 186.

CHAPTER III.

CONCEALMENT, REPRESENTATIONS AND WARRANTIES.

10. **Introduction.**—In the law of insurance, concealment, representations and warranties are closely related, and can be most easily distinguished by illustrations and comparisons.

Suppose that A sells B some flour and conceals the fact that it is unfit for any use. In the law of sales, we say that A is guilty of a breach of an implied warranty, but in insurance law, when A conceals the fact that his house is near a gunpowder factory, we say that he is guilty of concealment. The difference is merely one of terminology. The term "implied warranty" in insurance law is used in another connection, to be noted presently.

Representations are of the same character in the law of sales and in insurance law. They are collateral inducements to the making of the contract, but form no part thereof. Much of the talk preceding a sale or the issuance of an insurance policy is, at most, nothing more than matter of inducement.

Warranties in sales and in insurance are quite different. In many states, if a breach of warranty occurs in the sale of a chattel, the purchaser cannot rescind and demand the return of the purchase money, at least if the seller acted in good faith and

the sale has been executed. To give the purchaser a right to rescind, the term in question should have been made a condition forming a part of the basis of the contract. In the law of insurance, if the insured is guilty of a breach of warranty he cannot recover his insurance even though he has acted in good faith. Hence, is it sometimes stated that all warranties in insurance law are conditions. This statement is misleading, however. The effect of warranties in insurance and conditions in sales is the same. But such conditions are distinguished from warranties in insurance in that insurance companies, when sued on the policy, must plead and prove breaches of warranty and the insured need not allege and prove compliance with all warranties as in the case of conditions.

11. **Concealment.**—A offers B, a perfect stranger to A, a low price for his farm and conceals the fact that the land contains valuable mineral deposits of which A knows that B is ignorant. B accepts the offer. A is not guilty of fraud, in a legal sense, in concealing the value of the land from B. Such parties, as attorneys say, deal at arm's length. But if A had recently been the guardian of B's estate, the rule would be otherwise. If A occupies a position of trust towards B in respect to the land it is A's duty to make full disclosure to B before purchasing.

All insurance contracts resemble the latter class of agreements. The insured must exercise the utmost good faith in procuring a policy of insurance. He cannot recover his insurance if he deliberately conceals a fact, which he knows he should disclose,

on the shallow ground that the company did not ask him about it.

Good faith and materiality. In England, the insured must disclose all material facts in order that he may be entitled to recover his insurance. The fact that he acted in good faith in failing to disclose a material fact is immaterial.

In the United States, this rule is adopted only in marine and not in fire and life insurance. If, in obtaining fire and life insurance, the insured acts in good faith in failing to disclose a fact about which the company has made no inquiry, the insurance company cannot defeat a recovery on this ground. Two reasons for the American rule may be suggested: (1) The company can always examine a man or a house, whereas a ship is frequently insured while at sea and inspection is impossible. (2) The insured who takes out fire or life insurance is compelled to answer such a multitude of questions before he gets his policy that he has a right to feel that he has told all he could possibly know or find out.

A word as to materiality. The insured may conceal from the company his knowledge that his ship was not sighted off Halifax on October tenth, as she should have been. The insurance is effected on the twentieth of October. On the twenty-first, the ship is sighted and is in perfect condition. On the twenty-fifth, she is lost in a gale. The insured cannot recover, because of material concealment. Whether or not a fact is material is determined solely by the situation at the time the contract of insurance is made. The subsequent course of events is of

no consequence in this respect. Had the insured disclosed his information he might have been unable to obtain insurance, or, he would probably have been charged a higher premium.[40]

Special inquiries. Failure to make full disclosure in answer to a question put to the insured by the company avoids the policy, unless the company waives the right to a complete answer. If inquiry be made, the insured cannot willfully conceal his knowledge on the ground that the matter is of no consequence and that the company should not have asked the question.

Assume that the question is, What mortgages on the property exist? An answer that the property is mortgaged to X for a thousand dollars, when there is also another mortgage, entitles the company to avoid the policy. But if the question asks for the amount of the mortgage, if any, an answer that the property is mortgaged without disclosing the amount is incomplete on its face. If the company proceeds to issue the policy without objecting to the answer, it cannot then avoid its contract on the ground of concealment.[41] We may say that in the first answer there is a latent, in the second a patent lack of responsiveness.

Termination of duty to disclose. The duty to disclose ends as soon as the contract is complete, even though the policy is not issued until several weeks later, or even though the policy is never issued. It is interesting, in this connection, to contrast the

[40] Lynch v. Dunsford, 14 East 494 (Eng.).

[41] Phoenix Mut. Life Ins. Co. v. Raddin, 120 U. S. 183, LEADING ILLUSTRATIVE CASES.

delivery of a conveyance of real estate with the delivery of an insurance policy. The legal title to real estate cannot pass by act of the parties until a duly acknowledged deed has been delivered to the grantee. Such grantee may then, by his own deed, pass on the legal title to a third party. On the other hand, an insurance contract need not be reduced to writing and a person insured does not generally contemplate transferring his rights to a third party, and even if he does, a new policy must frequently be issued and the old one delivered up and cancelled.

Duties of agents. Three well-known cases involving the duty of the insured's agent to make disclosure have been adjudicated.

In the first of these,[42] the master of a vessel purposely delayed sending the news of the loss of the ship, so that the owner might have time to effect insurance. The United States Supreme Court allowed a recovery on the theory that the instant the ship was lost, the master ceased to be the agent of the insured and that insuring the vessel did not fall within the scope of the master's duties.

The decision was criticized and contradicted by later English authority.[43] However, the House of Lords twenty years thereafter said, virtually, that the American decision is perfectly sound as far as insurance law is concerned if the assumption in reference to the termination of the agency is correct, though the holding in this regard is not very satisfactory.[44]

[42] General Int. Ins. Co. v. Ruggles, 12 Wheat. 408 (U. S.).
[43] Proudfoot v. Montefiore, L. R. 2 Q. B. 511 (Eng.).
[44] Blackburn, Low & Co. v. Vigors, 12 App. Cas. 531 (Eng.).

12. **Representations.** — Certain distinctions between representations and warranties must be noted: (1) Representations are but collateral inducements to the making of the contract. Warranties, in insurance, are agreed upon as essential parts of the contract. (2) Representations may be purely oral. Warranties must appear on the face of the policy or be incorporated therein by reference. (3) To avoid the policy, representations must be material. Warranties are deemed, conclusively, to be material. (4) Representations are required to be only substantially true. Warranties must be strictly complied with.[45]

Between concealment and representations we find no difference in so far as materiality is concerned. Both must be material in order that they may be of any consequence. However, though good faith protects the insured in this country, if there is concealment of a material fact in obtaining fire or life insurance, good faith is never a defense where one is guilty of misrepresentation.

Matters of opinion. Suppose that the insured is asked if he is of temperate habits. In many such cases an affirmative answer has been given though the insured suffered from an occasional attack of delirium tremens caused by excessive drinking. There are two difficulties here. The person might honestly believe himself temperate. Furthermore, there are so many views as to what constitutes temperance. Though a variety of decisions has been handed down on this question, it is interesting to

[45] Pawson v. Watson, 2 Cowper 785 (Eng.).

note that the United States Supreme Court allowed the insurance money to be recovered in a case of this character.[46]

In numerous cases where one states that he is not afflicted, for example, with Bright's disease, recovery has been allowed. The theory on which recovery is allowed is that there is here no misrepresentation, and what was said is true if all that is desired is an expression of opinion. However, one may state as a fact that which he does not know to be true, but only believes, and if he does state it as a fact its falsity is ground for avoiding the policy.[47]

Promissory representations. The term "promissory representation" applies to representations that certain conditions will be brought about in the future. We may lay it down as a rule that such representations are like snakes in Ireland. They do not exist. (1) If the statement is in the policy, it is not a mere representation but an essential part of the contract. (2) If not in the policy and the policy has been received, the parol evidence rule prevents the insurance company from showing it. To this rule there are these exceptions: by statute in certain states statements in the policy are made representations; fraudulent misrepresentations may be shown by parol testimony.

Materiality. Whether or not a representation is material is a question of fact generally left to the jury for determination. In several states it is enacted by statute that representations shall not be

[46] Knickerbocker Life Ins. Co. v. Foley, 105 U. S. 350.

[47] Lord Mansfield in Fillis v. Brutton, 1 Park. Ins. 8th ed. 414 (Eng.).

deemed material unless the matter misrepresented actually contributes to the loss. According to this rule, apparently, if a man represents that the walls of his frame house are of stone, he can recover his insurance if the house burns, even though insurance rates on stone houses are much lower than on frame dwellings, unless the company can show that if the walls had been stone the house would not have burned or that the loss would not have been so great.

13. **Warranties.**—We have learned that though representations must be but substantially true, warranties must be strictly complied with. However, a rule of construction adopted by the courts has assisted insured persons in this regard. The courts are very reluctant to decide that a given statement is a warranty. It has been said that there must be no room for any other construction.[48] And in determining the exact matter warranted the courts are equally strict. For example, it has been held that where one warrants that smoking is not allowed on the premises he is making a statement only as to the existing rules and he himself may, in the future, smoke in the building with impunity.[49]

Promissory warranties. Unlike promissory representations, it is well settled that warranties may look to the future. For example, one may and frequently is required to agree to keep an iron fireproof safe on the premises, or, not more than a certain amount of gasoline. Nevertheless, as illustrating the courts' reluctance to expand warranties and

[48] Insurance Co. v. Woods, 54 Kan. 663.
[49] Hosford v. Germania Fire Ins. Co., 127 U. S. 399.

their anxiety to restrict them, it has been held that where the insured declared "that he does not now, nor will he, practice any pernicious habit," *declaring* is not the same as promising and that no promissory warranty had been made, though the insured soon drank to excess and in consequence died from an attack of delirium tremens.[50]

Description. Though the insured agrees to warrant all statements contained in his application, the fact that he calls himself John T. Smith instead of John F. Smith would certainly not avoid the contract, unless a mistake in identity resulted.

Accordingly, it was held that calling a ship the "Three Sisters" is not a warranty that the ship is English and the insured may recover though she is a Spanish vessel and her name in Spanish is "Tres Hermanas."[51]

Materiality. When a matter is warranted, the insured cannot recover even though he can show that the matter is immaterial. Thus, where a vessel was warranted to navigate only in inland waters, but went to sea, then came back unharmed and was later lost in inland waters, no recovery could be obtained.[52] And therein lies the virtue of warranties from the insurance company's standpoint. It might have been impossible to show that the ship was rendered more liable to sink through going to sea. A warranty relieves the company of this necessity.

Statutory changes. In several states, statutes have abolished the distinctions between representations

[50] Knecht v. Mutual Life Ins. Co., 90 Pa. 118.
[51] Clapham v. Cologan, 3 Camp. 382 (Eng.).
[52] Cogswell v. Chubb, 1 N. Y. App. Div. 93.

and warranties by providing that a breach of warranty is no defense unless it is material, or unless fraud appears. Such statutes virtually make all warranties representations in so far as protection to the insurance companies is concerned.

Implied warranties. It is only in marine insurance that we find the term "implied warranty." The term apparently contradicts what has been said in regard to the necessity of warranties appearing on the face of the policy. However, these so-called implied warranties are really conditions to the attachment of the risk, rather than true warranties.

For example, it is said that in a voyage policy there is an implied warranty that the ship is seaworthy for the purpose of the voyage insured and that if she is unseaworthy, the risk does not attach even though nothing is said about seaworthiness in the policy. This is the same as saying that such seaworthiness is a condition precedent to the policy's going into effect.

CHAPTER IV.

SUBROGATION.

14. **Introduction.**—Subrogation is a general principle recognized in courts of equity. In many instances the court of equity will substitute one person, X, in the place of another, Y, to whose rights against a third, Z, X thereby succeeds. The simplest case is that wherein a surety upon paying the claim of his principal to the creditor succeeds to the creditor's rights against the principal. A misuse of terms is frequently made by law students in saying that X subrogates Y's rights against Z. The student should say that X is subrogated. The court, by its decree, subrogates him.

The doctrine of subrogation as applied to insurance may be stated as follows: When the insured has, irrespective of the insurance, a legal right to compensation from another, such right being of such a character that the insured might receive more than indemnity upon the occurrence of the event insured against, the insurer, upon indemnifying the insured, succeeds to this right.

15. **Property insurance.**—We will consider, first, the application of the doctrine of subrogation to property insurance, which includes particularly fire and marine insurance.

16. **Same subject—Is the right contractual or equitable?**—Though the right of subrogation may be

modified or even destroyed by contract,[53] the right arises not out of the contract between the insured and the insurer but has its origin in general principles of equity. Though it is frequently provided in the contract that the right shall exist, it may exist without such a provision.[54]

The difference between purely contractual rights and this right can be readily illustrated. If R negligently burns F's house, F probably could not, by contract, assign his claim against R to C. Nevertheless, C, if an insurance company, may, by virtue of the doctrine of subrogation, succeed to F's rights against R.[55]

17. **Same subject—The insurer claims through the insured.**—The insurer in asserting the right of subrogation claims through the insured and never acquires rights against the wrongdoer superior to those of the insured. Thus, where F lost a house and shop by a single fire caused by R's negligence, and then, through mistake of counsel, sued and recovered damages for the loss of the shop, without including the house, it was then too late for C, the insurance company, upon paying the insurance due on the house, to sue R for damages to the house. Since R has a good defense, res adjudicata, against F, he has the same defense against C.[56]

In like manner, where F owned two ships, A and B, which collided through the negligence of the pilot

[53] See § 22, entitled "Right as affected by acts of the insured."

[54] The rule to the contrary in Massachusetts is law in no other state. King v. Watertown Fire Ins. Co., 132 Mass. 480.

[55] Railroad Co. v. Neet, 7 Kan. App. 495.

[56] Trask v. H. & N. H. Railroad Co., 2 Allen 331 (Mass.).

on A, even though the owners of cargo on B could sue F, as the owner of A, the insurance company on paying the insurance in respect to injury to B cannot then sue F, as owner of A, and thus decoy the money back on the pretext of subrogation. F, as owner of B, had no right to sue himself as owner of A. Lord Blackburn declared very properly that a right of action cannot be transferred unless it already exists, and that by paying the insurance money no fresh right is created.[57]

One further word in regard to this case is necessary. The reader may not know that the negligence of the insured in causing the loss does not excuse the insurance company from liability.

18. **Same subject—Nature of the right of the insured against the third party.**—Suppose that, through no one's fault, a farmer, F, loses his barn in a fire. His neighbors fail to put out the fire, but, out of sympathy, take up a collection and donate the proceeds to F, who deposits this sum in a bank and then collects insurance which fully indemnifies him. Can the insurance company, C, then claim subrogation to this fund in the bank? Clearly not.[58] There can be no subrogation unless F had a legal right to compensation against his neighbors. It is assumed that he did not.

At the other extreme we find cases in which the third party is absolutely liable. For example, by statute, railroads have been made liable, in certain states, for fires caused by their engines, though free

[57] Simpson & Co. v. Thomson, 3 App. Cas. 279 (Eng.).
[58] Burnand v. Rodocanachi, 7 App. Cas. 333 (Eng.).

from negligence. It has been suggested that if there is to be any subrogation in such cases, the railroad should be subrogated to the insured's rights against the insurance company. However, the rule is the reverse of this.[59] The insurance company, on indemnifying the insured, is subrogated to the latter's rights against the railroad.

Not only must the third party be legally responsible to the insured, but the liability must arise out of the loss. For example, X fraudulently represented a house to be worth $10,000, and thereby induced F to buy it. F then insured it. After the fire it was held that the insurer could not claim subrogation to F's rights against X.[60] The decision is based on the ground that X's liability did not arise out of the loss; that his language, however pernicious, did not cause the house to be destroyed. Had X intended to deceive the insurer into issuing a $10,000 policy, and had he succeeded, the court might have recognized an independent right of the insurer to sue for deceit.

There is but one exception, which must be noted, to the doctrine that the right must arise out of the loss to entitle the insurer to subrogation. If A, a mortgagee, insures the mortgaged property for his sole benefit,[61] the insurer upon paying to the mortgagee, in case of loss, the full amount of the mortgage, becomes subrogated to the rights of the mortgagee

[59] Mathews v. St. Louis & S. F. R. Co., 121 Mo. 298, 25 L. R. A. 161.

[60] Farmers' Fire Ins. Co. v. Johnston, 113 Mich. 426, 71 N. W. 1074.

[61] The rule which follows does not apply if the insurance is for the benefit of both mortgagor and mortgagee. See a subsequent chapter in regard to the rights of beneficiaries.

against the mortgagor under the mortgage.[62] Here it is clear that the mortgagee's rights do not arise out of the loss, that the mortgagor has not committed a tort and that the mortgagee's right against the mortgagor is purely contractual. Nevertheless, it is well settled that subrogation exists.

However, certain decisions in New York leave us in doubt as to how far we may go in allowing the insurer to be subrogated to rights which exist solely by virtue of a contract between the insured and the third party.[63]

In one of these cases,[64] the insurance covered uncompleted buildings for which the insured was not compelled to pay the contractor until completion. The buildings having burned before completion, the New York court, in an action by the insured against the insurer, declared that the insurer could not "resort to the terms of the building contract to diminish the liability for an actual loss within the terms of the policy."

19. **Same subject—Nature of the insured's right against the insurer.**—Let us modify the first illustration in the last section. Let us assume that the insurance company donates to the owner a sum equal to the value of the barn destroyed. This situation might arise where, through the act of the insured in keeping dynamite on his premises, he is unable to enforce the payment of his insurance. We may assume that R negligently caused the fire. Is there

[62] This is the common law rule outside of Massachusetts.

[63] Michael v. Prussian Nat. Insurance Co., 171 N. Y. 25, 63 N. E. 810, LEADING ILLUSTRATIVE CASES.

[64] Foley v. Manufacturers', etc., Insurance Co., 152 N. Y. 131, 43 L. R. A. 664.

subrogation here? It is a well-settled principle in equity that a mere volunteer, one who was not compelled to pay, is not entitled to subrogation.

However, it is equally well settled that, where insurance has been effected, the insurance company upon indemnifying the insured is entitled to subrogation against a wrongdoer who causes the loss, even though the insurer might have recovered judgment by pleading some defense when sued on the policy by the insured.[65]

In one case the tort-feasor defended himself on the ground of contributory negligence. He contended that the insurance company was guilty of contributory negligence in assuming the risk. But the court promptly rejected the plea.[66]

20. **Same subject—Confusion due to other principles.**—The most intricate case of subrogation in insurance law is Castellain v. Preston.[67] Preston owned a building which he insured with Castellain, or at least, for our purpose, we will call Castellain the insurer, though in fact he merely represented an insurance corporation. Preston made a contract for the sale of the premises to Rayner under such circumstances that, in equity, Rayner was compelled to pay the full purchase price though the property had been destroyed by fire, and although the legal title had not been conveyed. Castellain, in ignorance of the contract of sale, paid the insurance money to

[65] United States v. Amer. Tobacco Co., 166 U. S. 468, LEADING ILLUSTRATIVE CASES.

[66] U. S. Casualty Co. v. Bagley, 129 Mich. 70, 55 L. R. A. 616.

[67] Castellain v. Preston, L. R. 11 Q. B. D. 380 (Eng.), LEADING ILLUSTRATIVE CASES.

Preston immediately after the fire. Here was where Castellain may have made a mistake. In many cases the change of title in Preston would have avoided the insurance. However, after the money had been paid, Rayner sued Preston and contended that the insurance money should either be paid to Rayner or applied towards reinstating the buildings. Rayner was denied relief, though a dissenting judge was of the opinion that the money should be held in trust for Rayner.[68] A Maryland court has decided in accordance with the views of this dissenting judge,[69] and the English decision appears to be erroneous on principle.

However, the rather surprising rule laid down in Rayner v. Preston made the decision in Castellain v. Preston inevitable. The court held that Castellain was entitled to subrogation to Preston's right under the contract of sale so that Castellain might recover thereunder to the amount of the insurance.

This decision appears to be sound, if Rayner v. Preston is correct. But if we agree with the Maryland court, the situation in Castellain v. Preston cannot arise.

Similar confusion probably existed in the mind of the losing counsel in another case. F shipped a box over the R railroad and C insured it. The box was destroyed by fire through no fault of R, but, under common law rules, R was nevertheless liable. C paid F and then claimed subrogation to F's rights

[68] Rayner v. Preston, L. R. 18 Ch. D. 1 (Eng.), LEADING ILLUSTRATIVE CASES.

[69] Skinner, etc., Co. v. Houghton, 92 Md. 68, 48 Atl. 85.

against R. R's counsel contended that the doctrine of subrogation was inapplicable here; that a common carrier is himself an insurer and that, in any event, R was at most a co-insurer along with C, and was not liable for more than half the loss. The court very properly disagreed. A common carrier, under ordinary conditions, is not an insurer. More accurately, we should say that he is merely liable as such.[70]

21. **Same subject—When does the right accrue?** —One of the fundamental rules of subrogation is this: There can be no subrogation until indemnity is complete. For example, a mortgagee holding a thousand dollar mortgage insures the property for his sole benefit in the sum of five hundred dollars. Then a fire occurs causing a loss of three hundred dollars. The insurance company can claim subrogation to the rights of the mortgagee against the mortgagor under the mortgage, but not upon paying three hundred dollars, the amount of the loss; nor yet five hundred, the amount of the policy; but only on payment of a thousand, the amount of the mortgage, since only then will the mortgagee's claim against the mortgagor be fully satisfied. Thus, the insurer must either pay a full thousand and demand immediate subrogation, or pay three hundred and wait until the mortgagee has received seven hundred from the mortgagor and then make the demand.[71]

Because of principles to be explained in the next section we should, perhaps, for the sake of accuracy,

[70] Hall & Long v. The Railroad Co., 13 Wall. 367 (U. S.), LEADING ILLUSTRATIVE CASES.

[71] Phoenix Ins. Co. v. First Nat. Bank, 85 Va. 765, 8 S. E. 719, LEADING ILLUSTRATIVE CASES.

say that an imperfect, or conditional, right of subrogation, which the insured must respect, arises as soon as the loss occurs, but that the right is not enforcible directly until the insured's indemnity is complete.

22. **Same subject—Right as affected by acts of the insured.**—At three different times the insured may affect, or attempt to affect, the insurer's right of subrogation: (1) before the loss; (2) after the loss, but before the insurer settles; (3) after the insurance company settles.

Before the loss. The most common situations, wherein the insured has affected the right of subrogation before the loss, have been cases in which goods have been shipped by common carrier, X, and insured by the shipper, F, with an insurance company, C. In such cases the bill of lading issued by X may provide that X shall have the benefit of any insurance effected by C, or, the policy issued by C may expressly provide that the insurer shall be entitled to subrogation against the carrier if the carrier becomes liable to F for the loss of the goods, and that if F in any way interferes with the right of subrogation, the policy shall be void; or both provisions may appear. If the bill of lading provides that X shall have the benefit of any insurance, but the policy says nothing on the subject, C must pay the insurance and cannot obtain subrogation.[72] X is relieved entirely if the property is fully covered by insurance, and pro tanto if the property is more

[72] Wager v. Providence Ins. Co., 150 U. S. 99, LEADING ILLUSTRATIVE CASES.

valuable.[73] If the bill of lading says nothing, but the policy expressly provides for subrogation, such a provision is entirely superfluous. The right would exist even in the event that there were no such provision.

However, cases have arisen in which both provisions appeared. Three possible decisions may be reached. F may be allowed to recover from X, or from C, or from neither. It has been held that where it was provided in the policy that C should not be liable, F cannot recover from C.[74] But in such a case it has been held that F can recover from X, in full, on the theory that there is no insurance of which X can receive the benefit.[75] Even if C voluntarily pays F on condition that C shall have the right to proceed against X, X cannot complain and is liable for the loss.[76] Then a case might arise in which F could not recover from either X or C, but no such case is reported.

After the loss, but before settlement by the insurer. After F's house is burned by R's negligence and before the insurer, C, pays anything to F, F may release R from all liability. Though such a release destroys the right of subrogation, C is thereby discharged to the extent of the value of F's right against R.[77] But suppose that C pays the insurance money to F in ignorance of the release of R. It is clear that F can be compelled to pay back the insurance

[73] The Sidney, 23 Fed. 88.

[74] Fayerweather v. Phenix Ins. Co., 118 N. Y. 324, 6 L. R. A. 805.

[75] Inman v. S. C. Ry. Co., 129 U. S. 128.

[76] Southard v. Minneapolis, St. P. & S. M. Ry. Co., 60 Minn. 382, 62 N. W. 442, LEADING ILLUSTRATIVE CASES.

[77] Atlantic Ins. Co. v. Storrow & Boyd, 5 Paige 285 (N. Y.).

money to C.[78] However, if F has absconded, which of the two innocent parties, R or C, should bear the loss if both were free from negligence? On principle, the loss should fall on C, who had but an equitable right of subrogation, which was cut off by the release of R.

After payment by the insurer. Upon fully indemnifying the insured for his loss, it is clear that C is entitled to subrogation to the rights of F against R. Assume that after C thus settles with F, R purchases a release from all liability from F. If the release is purchased by R with full knowledge of C's rights, it in no way affects the right of C against R by virtue of subrogation.[79] But if the release is purchased without the knowledge of the rights of C, the rights of C against R are destroyed. This is true because R is then in the position of a bona fide purchaser of a release of a legal right against himself from F who holds the claim in trust for C, C being in the position of a cestui que trust whose equitable interest has been cut off as against an innocent purchaser.[80]

23. **Same subject—Amount of recovery.**—The right of subrogation is limited to the amount which the insurer is compelled to pay. It would be as unjust and as dangerous to allow insurance companies to profit by fires as it would be to allow such a gain to be made by the insured.

In many, if not in most, cases the property is insured for less than its full value. It is then merely a matter of procedure to arrange for an action in which

[78] Chickasaw, etc., Ins. Co. v. Weller, 98 Iowa 731, 68 N. W. 443.
[79] Hart v. Western Ry., 13 Metc. 99 (Mass.), 46 Am. Dec. 719.
[80] Same case, at page 106.

the three parties shall be fully represented. If the insured is unwilling to sue the third party, the insurer has no difficulty, today, in being permitted to sue either in his own name, or at least in the name of the insured for the benefit of the insurer.

Assume that, by statute, a railroad is liable for treble damages if grossly negligent in causing a fire, and that insured property has been destroyed in this manner. Here someone is going to get a windfall. Shall it be the insurance company or the insured? The court in Maine felt that it should be the insurance company after it has indemnified the insured.[81]

24. **Life insurance.**—A creditor has insured his debtor's life for $1,000 and the amount of the debt is also $1,000. Then the debtor dies and the insurer pays the insurance to the creditor. Shall the insurer be subrogated to the creditor's right to collect $1,000 from the debtor's estate? From what we have already learned in this chapter as to the subrogation of an insurer to the rights of a mortgagee, one might conclude that subrogation would be allowed here.

However, it is unanimously agreed that the doctrine of subrogation has no application to life insurance.[82] Both satisfactory and unsatisfactory reasons for this rule have been offered.

First, it has been said that where a life insurance company seeks subrogation to the right of the insured's personal representative or next of kin to recover damages for death by wrongful act, the right to damages is purely statutory and at common law

[81] Rockingham, etc., Insurance Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618.

[82] Conn. Mut. Life Ins. Co. v. N. Y., N. H. & H. R. R. Co., 25 Conn. 265, LEADING ILLUSTRATIVE CASES.

it did not exist because the cause of action died with the person. However, in a multitude of cases of property insurance, subrogation is allowed though the right against the third party is statutory; for example, where a railroad is made absolutely liable for fires caused by its engines even though it has not been negligent.

Another argument advanced is that even by statute no right in the insured exists to recover for death by wrongful act, and that the right is given only to members of his family or his kin. Though this is true as to most of these statutes, a few of them provide that the cause of action shall survive and be handled as if the deceased were alive. Thus they allow a recovery by the administrator for the pain of the deceased.[83] In such a case the right of action might be regarded as residing in the insured or as part of his estate.

A further argument is this, that life insurance is a matter of investment and not indemnity. However, in the case of a creditor insuring his debtor's life for a term of years, the element of indemnity is practically the sole feature.

There would, however, be this practical difficulty in allowing subrogation. It would be necessary to determine the exact value of a human life. This might prove embarrassing to the family of a worthless person, but not more so than such a controversy in an action for death by wrongful act.

25. **Accident insurance.**—F has his right leg insured for $1,000. He loses it in a railroad wreck and then recovers $1,000 from the railroad company.

[83] Quinn v. Johnson Forge Co., 9 Houst. 338 (Del.), 32 Atl. 858.

Shall we allow him to recover $1,000 from the insurer as well as from the tort-feasor? Would this be unjust enrichment? Regardless of what one's opinion may be, it has been decided that there can be no subrogation in accident insurance.[84] The court reasoned that so far as subrogation is concerned, accident insurance resembles life rather than property insurance. But that was the very question for the court to decide. Is it true that, in general, accident insurance resembles life rather than fire insurance? We might argue just the other way. A man must die, but his house need never burn. There is no necessity for losing one's legs. Most men do not.

But even if subrogation is allowed, the insurance company might have difficulty in asserting the right to any advantage, because the insured is really never fully indemnified for the loss of a part of his body or for an injury. The insurance company might contend that the judgment in an action by the insured against the tort-feasor conclusively determines the amount of the injury. However, the rule is the other way. Such a judgment is, at most, but evidence in the insurer's favor.[85]

26. **Indemnity insurance.**—Indemnity insurance is but a commercialized form of suretyship, and it was in the law of suretyship that the doctrine of subrogation arose and developed. Hence there is no question but that an indemnity insurance company on indemnifying a creditor may assert subrogation to the creditor's rights against the debtor.

[84] Aetna Life Ins. Co. v. Parker & Co., 96 Tex. 287, 72 S. W. 168.
[85] Aetna Insurance Co. v. Confer, 158 Pa. St. 598, 28 Atl. 153.

CHAPTER V.

WAIVER AND ESTOPPEL.

27. **Waiver and estoppel distinguished.**—Though closely allied it is possible in most cases to distinguish waiver from estoppel. Take a case in agency. A merchant has in his employ an agent to collect bills each month from certain customers. Suddenly the agent is discharged, but the merchant does not give his customers notice of the discharge. The customers, in ignorance of the discharge, pay the discharged agent, as usual, the next month. The agent then absconds. The loss falls on the merchant.

Have we here a case of waiver or estoppel? Shall we say that the merchant had a right to give notice to the customers, but that by failing to do this he waived his right to cut off the agent's ostensible authority? Or shall we say that the merchant, by his failure to give notice, has misled the customers and is now estopped to deny the authority of the agent? The latter statement is the customary one, for the former would have a strange sound in the ears of a lawyer.

Waiver. By waiver we mean the relinquishment of a right. For example, the policy may provide that if the insured keeps dynamite on the premises, the policy shall be void. The insurance company, after the issuance of the policy, may tell the insured

that he may keep dynamite in his house for six months. This is a waiver of the company's right to declare the policy void on this ground.

But the over-zealous student of contracts may contend that the promise of the insurer to allow this is unenforcible, because it is not supported by consideration. We must remind him that the law of contracts requires consideration only in the making of a contract, not in the waiving of some particular right thereunder.[86] At least, such is the holding in quite a few insurance cases.[87] However, several courts have held that the insurance company's waiver is of no effect unless supported by valuable consideration or accompanied by the element of estoppel.[88]

Waiver is frequently defined as the voluntary or intentional relinquishment of a right with knowledge of its existence. What is meant by voluntary or intentional? It is a matter of frequent exasperation to an insurance company, after it has carefully drawn up a policy forbidding dynamite on the premises, to find the court saying that by telling the insured that he could do some blasting on the premises, the insurer has waived its right to object to the dynamite. But, the insurer rejoins: "We said nothing about dynamite and neither voluntarily nor consciously waived this dynamite provision." Then the court, in surrejoinder, declares that, dynamite being incidental and necessary in blasting, the insurer waived its right to forbid the dynamite by allowing the

[86] Schwartz v. Wilmer, 90 Md. 136, 144; 44 Atl. 1059. However, a conflict of opinion on this question must be admitted.

[87] Home Fire Ins. Co. v. Kuhlman, 58 Neb. 488, 76 Am. St. Rep. 111.

[88] Ripley v. Aetna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362.

blasting. It can hardly be said in this case that the insurer was conscious of the relinquishment.

Then, as to its being the relinquishment of a known right, we must recall the maxim that every man is presumed to know the law. The maxim should, perhaps, read: "Ignorance of the law excuses no one." In either form it applies here. We may say that when the insurance company accepts a premium which it knows is past due but in ignorance of its right to reject it because of the tardiness in payment, it is presumed to know its rights or that its ignorance is no excuse. Hence, when we speak of a known right here we do not mean that the company knows the law applicable to the case. However, there can be no waiver without a knowledge of the essential facts as distinguished from the law on which the situation is based. Accordingly, where an insurance company accepted premiums in ignorance of the fact that the insured had been living farther south than the policy permitted, it was held that no waiver had occurred, and that the insurance could not be recovered.[89]

Estoppel. Estoppel arises when one by his conduct so misleads another, that the former is not permitted, or, as we say, is estopped from asserting a right which he might otherwise assert. In theory, the person estopped still has the right but cannot assert it. There is really but little difference between having a right which one cannot assert and losing it. Thus, when the insurance company assures the insured that his policy is still in force and thus mis-

[89] Globe Mut. Life Ins. Co. v. Wolff, 95 U. S. 326.

leads him into the belief that he has insurance and need not procure other insurance, the company cannot thereafter deny that its policy was in force at the time when its assurance was given. The essential elements of estoppel are: (1) conduct calculated to mislead; (2) reliance upon such conduct by one having a right to rely thereon; (3) to the prejudice or damage of the party misled.

We must not get the cart before the horse. There is no reason for an estoppel if (2) comes before (1). However, there is a dictum in an Indiana case which sanctions the coming of (2) before (1).[90] Where the insured had sixty days in which to file his proofs of loss, it is intimated that, if the company accepts them after the sixty days are past, it may then be held estopped to assert that the proofs were not filed in due time. How can one be misled into doing something after he has already done it? Ex post facto and retrospection are terms that are familiar to every law student. However, they are conceptions which are out of place here.

Implied waivers. When we come to implied waivers, we find ourselves in a twilight zone in which the distinction between waiver and estoppel practically disappears.

"While express waiver rests upon intention, and estoppel upon misleading conduct, implied waiver may rest upon either; for it exists when there is an intention to waive unexpressed, but clearly to be inferred from circumstances, or when there is no such intention in fact, but the conduct of the insurer has

[90] Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921.

misled the insured into acting on a reasonable belief that the company has waived some provision of the policy."[91]

This language justifies us in saying that in every case of estoppel, the insurer has impliedly waived its rights.

It must not, however, be supposed that all waivers are implied. Many are express. Every day the insurance companies paste little slips of paper on policies which have been already issued. Such slips are known as "riders" and provide, for example, that the insured shall have the privilege of leaving his house vacant for a longer time than that allowed in the printed policy.[92]

What are the elements necessary to constitute an implied waiver? One might conclude that they are the same as those at the basis of the doctrine of estoppel in insurance and in other branches of the law. However, the decisions of many courts appear to justify us in saying that the insured need not show the second element of estoppel in order to prove an implied waiver. That is, he need not show that he was actually misled.

For example, the insurer may have sent the insured notice of premiums due for a sufficient number of times so that the court would hold that the insurer has impliedly waived its right to insist upon payment without notice. Suppose that the insurer could show that the insured was bankrupt and utterly unable to pay his premium even if notice had been

[91] Quoted in the case last cited.

[92] Goddard v. East Texas Fire Ins. Co., 67 Tex. 69, 1 S. W. 906.

sent. Such evidence would be rejected by many courts.[93]

Furthermore, many courts have held that mere silence on the part of the insured may be sufficient conduct to mislead, and such decisions appear perfectly sound because, it is submitted, in this connection a contract of insurance is one which undoubtedly requires the exercise of the utmost good faith on both sides.

For example, many courts have held, very properly, that where the policy provides that it shall become void if other insurance is taken out without the insurer's consent, there is a duty resting on the insurer, when it is notified of such other insurance, to inform the insured of its intention to declare the policy void and that, if it does not, it impliedly waives its right.[94]

28. **Parol waivers of rights under the policy—Parol evidence rule.**—In many cases, the policy provides, for example, that a groceryman shall keep an iron fireproof safe for his books on his premises, and that if he does not, the policy shall be void. The groceryman confers with the duly authorized agent of the company and the agent informs him that a good, strong tin box is sufficient. The store burns and the groceryman sues on the policy. The company then sets up the iron safe clause as a defense. At the trial, the insured proposes to show the conversation with the agent. The company objects to the evidence

[93] This is the principle recognized in Weiss v. American Fire Ins. Co., 148 Pa. 349, 23 Atl. 991.

[94] Orient Ins. Co. v. McKnight, 197 Ill. 190, 64 N. E. 339, LEADING ILLUSTRATIVE CASES.

on the ground that the parol evidence rule forbids the introduction of parol testimony to vary the terms of a written instrument. Let us assume that the court sustains the objection.

Does this leave the groceryman without remedy? It is the rule everywhere that it does not. The groceryman may dismiss his action at law on the policy and file a suit in equity and can, in many instances, obtain from the court of equity a decree reforming the contract so that it will correspond to the actual agreement of the parties. Such relief may be obtained on the ground of fraud or mutual mistake of fact.

If this is true, then why have persons appealed their cases even to the United States Supreme Court, in actions on the policy, in their efforts to have such parol evidence admitted in their actions at law, when they might have saved time and expense by dismissing their actions at law and bringing new suits in equity for reformation? The chief reason, undoubtedly, is this: that in equity the plaintiff cannot demand a jury as a matter of right, and in many cases of this kind the court will decide the matter without the aid of a jury. On the other hand, in an action at law, the plaintiff may demand a jury as a matter of right, in most cases. This he would generally do because he has good reason to feel that he has a better chance to recover if there is a jury, particularly if his case is of doubtful merit. Furthermore, the plaintiff must prove his case only by a preponderance of the evidence in an action at law. In a suit in equity for reformation he will get no relief

unless he establishes his case by evidence which is "clear, unequivocal and convincing."[95]

Perhaps nowhere else in the law of insurance is there so much confusion as upon the exact question which we are about to consider, and, curiously enough, there are virtually no English insurance decisions to guide us. The question is, When may oral testimony be introduced in an action at law to contradict the terms of the policy?

29. **Same subject—Waiver prior to the delivery of the policy.**—Insurance policies are instruments of considerable dignity, not because of the gorgeous Indians and other ornamentations which so frequently appear on the face of them, but because a policy is not generally, and should never be issued until after all preliminary negotiations have been completed. Such preliminary matters are deemed superseded entirely and of no validity as evidence, at law, after the delivery and acceptance of the policy, into which all prior understandings become merged.

Accordingly, it appears to be pretty well settled that in an action at law on the policy, the insured cannot show, by parol evidence, an agreement which he had with the company, prior to the acceptance of the policy and in contradiction of the terms of the policy.

Therefore, where a policy provided for the forfeiture of the insurance on failure to pay a premium when matured, it was held that the plaintiff could

[95] United States v. Budd, 144 U. S. 154; Northern Assur. Co. v. Grand View Bldg. Assn., 203 U. S. 106.

not show that the company had promised, before the delivery of the policy, that the premiums need not be paid promptly.[96] The court declared that the entire agreement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be stated in the policy and that, until corrected by refutation in a court of equity, the policy must be taken as expressing the final understanding of the insured and of the insurance company.

30. **Same subject—Waiver at the time the policy is delivered.**—It would be difficult to prove that the weight of authority accords with the rules about to be stated in reference to the admissibility, in an action at law on the policy, of parol evidence in regard to matters existing at the time the policy is delivered, for the purpose of contradicting the terms of the insurance policy. Nevertheless, it would be equally difficult to prove the contrary.

However, the rule about to be stated is comparatively easy to apply and, if not a true statement of the prevailing principles, we must be forced to admit that there are no general rules on the subject, or that each jurisdiction has its own rules. The suggestion, which has been made, that insurance policies should not be protected by common law rules, smacks of unfairness and cannot be supported on any principle of justice.

This rule rests upon a "distinction between the knowledge of an existing fact which renders a policy void when delivered and the omission of the insured

[96] Union Mut. Life Ins. Co. v. Mowry, 96 U. S. 544.

to give notice of and procure the required consent to a subsequent act, which by its conditions invalidated it, although previously consented to."[97] The former kind of contemporaneous waivers may be shown, while the latter cannot.

For example, where it was provided in the policy that the instrument should be void if the building insured was located on leased ground, it was held that the insured could show by parol that the insurance company knew at the time it delivered the policy that the building was thus situated. "Such a condition as this may be waived by the insurer, by express words to that effect, or by acts done under such circumstances as would otherwise impute a fraudulent purpose and as will estop him from setting up the condition against the insured."[98] What, it may be asked, is "such a condition"? It is one wherein the risk would not have attached but for the waiver. There would never have been an instant of time when the loss would have given the insured the right to recover, unless he be permitted to show such a waiver.

Let us now consider contemporaneous waivers which cannot be shown. In a case previously cited,[99] the insurance company delivered a policy containing a clause which provided that the policy should become void if "the insured shall procure any other insurance on the property covered by this policy,

[97] Gray v. Germania Fire Ins. Co., 155 N. Y. 180, 49 N. E. 675, LEADING ILLUSTRATIVE CASES.

[98] Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. 434, LEADING ILLUSTRATIVE CASES.

[99] Gray v. Germania Fire Ins. Co., supra.

without the consent of the insurer endorsed hereon." At the time of the delivery of the policy, the insured told the company, through its agent, of his intention to take out other insurance, and the company, through its agent, replied that the policy was correct. Here it is clear that the policy "was valid in its inception."[1] It became invalid only in the future, when the other insurance was taken out in violation of the terms of the policy. Therefore, it was held that the parol evidence rule prevented the insured from showing such a parol waiver in an action on the policy. Hence, we may state the second part of this rule as follows: If the waiver at the time of the delivery of the policy relates solely to a state of facts to arise in the future and in no way tends to show that the policy was invalid when delivered, the evidence is inadmissible.

Two decisions of the United States Supreme Court. The decision of the United States Supreme Court on a question of this character does not bind the state courts. However, such a decision is, today, probably of much greater weight throughout the country than that of any other court of last resort, owing to the national character and personnel of the court. Two of its decisions in this connection have led to much discussion.

The Wilkinson case. In the first of these,[2] decided in 1871, an insurance agent had inserted in the application for life insurance, upon the life of Mrs. W., a representation that the mother of Mrs. W. had

[1] Gray v. Germania Fire Ins. Co., 155 N. Y. 180, 49 N. E. 675.

[2] Union Mutual Insurance Co. v. Wilkinson, 13 Wall. 222 (U. S.), LEADING ILLUSTRATIVE CASES.

died of fever, at the age of forty. The application was duly signed by Mrs. W. In an action to recover on the contract, the insurance company alleged that this representation was untrue. The plaintiff then proposed to show, by parol, that Mrs. W., an ex-slave, had told the agent of the insurer that she knew nothing about the time or cause of her mother's death. This evidence evidently contradicted part of the written contract. The court, however, held the evidence admissible and declared that the principle on which their decision was based was not that such oral testimony varies or contradicts that which is in writing, "but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying upon its contents; not that it may be contradicted by oral testimony but that it may be shown by such testimony, that it cannot be lawfully used against the party whose name is signed to it."

The Northern Assurance case. This very liberal rule in favor of persons insured, though adopted without a dissent, was shaken thirty years later by a decision from which three justices, including the chief justice, dissented.[3] In this case, the policy upon which the action was based contained a clause making the policy void if other insurance upon the property should exist at the time of the issuance of the policy without the consent of the defendant insurance com-

[3] Northern Assurance Co. v. Grand View Bldg. Assn., 183 U. S. 308, LEADING ILLUSTRATIVE CASES.

pany endorsed on the policy. The plaintiff proposed to show that the insurance company's agent knew of the existence of other insurance when the policy was delivered, though the endorsement did not appear on the policy. The Supreme Court, reversing the decision of the circuit court of appeals and of the circuit court, held the evidence inadmissible. The court did not overrule the Wilkinson case, in express language, but declared that parol evidence was properly admitted in that case to deny the execution of the statement upon which the insurer relied.

From what we have learned in this section we might have concluded that the evidence in the Northern Assurance case should have been admitted because the risk did not attach under the terms of the policy. However, the United States Supreme Court appears to have rejected this rule. That the question is not free from difficulty is evidenced by the holdings of the lower courts and opinions of the dissenting judges in the case.

It may be interesting to learn that the insured finally obtained his money from the Northern Assurance Company. The state court in Nebraska subsequently decreed a reformation of the policy and the United States Supreme Court refused to disturb the decree.[4]

31. **Same subject—Waiver subsequent to the delivery of the policy.**—We find, from our study of Blackstone, that there is no such a thing as an irrepealable law. "When you repeal the law itself, you

[4] Northern Assur. Co. v. Grand View Bldg. Assn., 72 Nebr. 149, 102 N. W. 246, 203 U. S. 106.

at the same time repeal the prohibitory clause, which guards against such repeal."[5]

This same principle applies to nearly all contracts. Though persons who marry cannot give up their relationship by mutual consent, probably no commercial contract can be drawn up in such a manner that the parties to the contract cannot agree to abandon or modify it, unless the rights of third parties be involved or the new contract be objectionable on grounds of public policy.

Accordingly, it is well settled that the parol evidence rule does not prevent the introduction of parol testimony to prove that after the delivery of the policy, a subsequent agreement modifying the agreement as evidenced by the policy, has been made. A provision in the policy that all future waivers must be in writing is like an irrepealable law. The insurer may waive this clause which guards against such a waiver.

Suppose that A, a generous man, donates breakfast to T, a tramp, at the door of A, at eight every morning for three months, or even for twenty-five years. Has T thus acquired a right to receive his breakfast thereafter, gratuitously, from A? Though, in England, the doctrine of "corodies"[6] might assist T, it is clear, in this country, that T has acquired no legal right against A.

Let us compare this with what is, apparently, a similar case in insurance. The policy requires the insured to pay his premiums on February first, of

[5] Cicero, as quoted in Blackstone's Comm. I, 90.
[6] Blackstone's Comm. I, 283.

each year, without notice or demand from the company. For several years, the company voluntarily sends a notice to the insured when each premium falls due. Should such generosity bind the company to do this every time in the future when a premium falls due? It does, by the weight of authority.[7] The reason for this rule is that the insurance company by its conduct has made an implied agreement to give the notice and that this agreement supersedes or waives the provision on this question in the policy.

32. **Extent of the doctrine of waiver.**—Certain rights of the insured and of the insurer cannot be waived. For example, the insurer cannot waive the right to defend on the ground that the insured had no insurable interest. By reason of public policy, insurance contracts in which the insured has no insurable interest in the property or life insured are illegal and void. To allow such a waiver would take us back to the days of "interest or no interest" policies.[8]

Rights given by statute. In many states, there are "valued policy" laws which require the insurer to pay the full amount of the policy in case of total loss, unless there has been depreciation in the value of the property. It has been held that the insured cannot waive his rights under the statute, on the theory that such a statute rests upon grounds of public policy.[9]

[7] Mayer v. Mutual Life Ins. Co., 38 Iowa 304, 18 Am. Rep. 34.
[8] See chapter on "Insurable Interest."
[9] Reilly v. Franklin Ins. Co., 43 Wis. 449.

Prescribed form of policy. In several states the exact form of an insurance policy is prescribed by statute. Such forms appear to be, not two-edged, but one-edged swords, and cut only in the direction of the insurance companies. Though the insured cannot, by a waiver of his part, lessen his rights against the insurer,[10] the company may waive clauses designed to protect itself and thus increase the rights of the insured.[11]

33. **Incontestable policies.**—To avoid the charge, made justly at times, and unjustly at other times, that the insurance companies always take advantage of every technicality to defeat recovery on the policy, several life insurance companies have adopted a form of policy containing what is known as an incontestable clause. This clause provides that the policy shall be incontestable either from date of issue, or, generally, after the lapse of one, two, or three years, except for the non-payment of premiums. Such a provision is annexed to all life insurance contracts by statute in certain states.

Such a comprehensive provision in regard to waiver does not prevent the insurer from showing, in defense, a lack of insurable interest. However, by the weight of authority, fraud perpetrated against the insurer in procuring the insurance cannot be shown.

Can the insurance company defend on the ground that the one whose life was insured is still alive? Clearly, it may. The incontestable clause, it seems,

[10] Wild Rice Lumber Co. v. Royal Ins. Co., 99 Minn. 190, 108 N. W. 871.
[11] Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80.

has nothing to do with the fact of death or matters arising thereafter, for example, failure to file proofs of death.

Can the insurance company set up suicide as a defense, if there is an incontestable clause? By the weight of authority it cannot, even though it might have done so but for the incontestable clause.[12]

[12] Patterson v. Natural Premium Mutual Life Ins. Co., 100 Wis. 118, LEADING ILLUSTRATIVE CASES.

CHAPTER VI.

ASSIGNEES.

34. **Introduction.**—In this chapter, it is assumed that insurance, valid in every respect, has been issued. The attempt will then be made to ascertain to what extent and under what conditions the person, entitled to rights under the policy against the insurance company, can assign his rights to a third person, so that the latter may assert his rights against the insurance company.

35. **Property insurance.**—There are at least five situations which may arise in reference to the right of persons, whose property is insured, to assign their rights: (1) There may be an absolute transfer of the title and possession of property insured and the policy may be assigned to the purchaser by the former owner who was the party insured, without the insurer's consent. In marine insurance, such assignments are common and valid, though the policy makes no express provisions for assignment.[13] In fire insurance, the rule is to the contrary. Unless the policy expressly allows for an assignment without the insurer's consent, it cannot be made. This is due to the fact that the contract is one in which the insurance company imposes much confidence in the insured and is regarded as strictly personal.[14] It

[13] Earl v. Shaw, 1 Johns. Cas. 313 (N. Y.); 1 Am. Dec. 117.
[14] Lyford v. Conn. Fire Ins. Co., 99 Me. 273, 58 Atl. 916.

happens every day that an insurance company is unwilling to insure a certain person, who might become an assignee of a policy if the rule were otherwise.

Since fire insurance does not pass with an assignment of the policy, a fortiori it does not pass if the property is sold and the policy is not assigned. It is well settled that fire insurance is not a right which "runs with the land," that is, it does not pass with a transfer of the land.[15] Though it is customary to say that X's house is insured, this is not technically correct. In strictness, it is X who is insured against the loss of his house. (2) Let us assume that we have the same state of facts, but that the insurance company consents to the assignment. Here it is clear that the assignee is protected. However, he is not protected because he is an assignee, but because there has been a novation, a substitution of a new contract in the place of an old one which is thereby extinguished.

This distinction between an assignment and a novation is made clear in an Indiana case.[16] The policy provided as follows: If the insured shall mortgage the property insured, without the consent of the insurer, this policy shall be void. However, the policy made no provision in reference to subsisting encumbrances. The property was mortgaged and then sold, subject to the mortgage, to M, who obtained the consent of the insurer to an assignment of the insurance policy. If this had been an ordinary

[15] Lynch v. Dalzell, 4 Bro. P. C. (Toml. ed.), 431 (Eng.).

[16] Continental Ins. Co. v. Munns, 120 Ind. 30, 22 N. E. 78, LEADING ILLUSTRATIVE CASES.

assignment, the assignee, as usual, would have stepped into the shoes of the assignor, and, since the policy had become void in the assignor's hands, the assignee could not have recovered. The court held that M could recover on the ground that upon "an assignment of the policy to the purchaser, duly assented to by the company, a new and original contract of indemnity arises between the insurance company and the assignee, which the latter may enforce without regard to what may have occurred prior to the assignment."

(3) One may assign his right to receive the proceeds, if any, under an insurance policy without invalidating the policy. For example, A, a gentleman of means, about to take a long ocean voyage and desirous of avoiding the worry and care of business matters, might designate his confidential agent, X, as his agent, to receive any insurance money to which A, while on his journey, might become entitled by reason of the loss of A's homestead. Here A remains the one who is insured and he retains an insurable interest in the property. In such a case, the contract of insurance does not become void even though the policy provides that it shall be void if there is an attempted assignment without the insurance company's consent. Here the policy itself is not assigned, but only the right to receive the money in case of loss.[17]

(4) The fourth case is that of collateral assignment. There are two kinds of assignments: absolute and conditional. If the assignment is absolute,

[17] Whiting v. Burkhardt, 178 Mass. 535, 52 L. R. A. 788.

the assignor retains no power whatsoever to recall the property or right assigned. If, on the other hand, the assignment is conditional, the assignor may reserve the right to take back the thing assigned upon the happening of a certain event. One of the most common forms of conditional assignments is the collateral assignment as security for a loan. For example, to secure a loan, the property may be mortgaged by X, the insured, to Y, to whom X may assign the policy conditionally and collaterally, that is, with the agreement that if within a year the money borrowed is repaid by X to Y, the mortgage and assignment of the policy shall be void. Such an assignment bears but little relation to an absolute assignment. Here X retains an insurable interest in the property. Accordingly, it has been held that such an assignment is valid and enforcible.[18]

Even though the policy forbids an assignment, this prevents only an absolute assignment and has no reference to a collateral assignment.[19]

This situation is not necessarily the same as in sub-section 3. Though the quasi-assignee here may acquire an insurable interest, in the case assumed in sub-section 3 he may be but a naked appointee without any insurable interest whatsoever.

(5) Let us assume that the policy expressly forbids an assignment either before or after the loss. Can the insurer forbid an assignment after the loss occurs?

An analogous situation is this: A philanthropist,

[18] Insurance Co. v. Phoenix Ins. Co., 71 Pa. St. 31.
[19] Griffey v. N. Y. Cent. Ins. Co., 100 N. Y. 417, 53 Am. Rep. 202.

A, gives a boy, B, a silver dollar on condition that he shall never spend it. Has B a right to spend it? Unquestionably he has. Such a condition is repugnant to the gift. Either A gave B the dollar or he did not. One of the wishes of A must be disregarded, either the gift or the condition. Clearly, it would be the condition.[20]

It is on this principle that it has been held that "a condition in a policy of insurance that an assignment after loss, and especially after the liability of the insurer has become absolute by compliance on the part of the assured with all conditions subsequent, shall forfeit the contract and invalidate the policy, is void. For certainly, such a condition is entirely inconsistent with the contract of indemnity after the liability of the insurer has become absolute, and only the ordinary relation of debtor and creditor exists between the insurer and the assured."[21]

The conclusion which we are forced to reach is this: If the loss occurs and then the assignment, the assignee will be protected. But if an absolute assignment of fire insurance without the insurer's consent occurs and then the loss, there can be no recovery.[22]

36. **Life insurance.**—Certain rules in regard to the assignment of the rights of the person entitled to the money due upon a life insurance policy are well established. (1) If the policy does not expressly prohibit it, an assignment is valid.[23] (2) The policy

[20] Bradley v. Peixoto, 3 Ves. Jr. 324 (Eng.).
[21] Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.
[22] North of England Oil-Cake Co. v. Ins. Co., L. R. 10 Q. B. 249 (Eng.).
[23] N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591.

may expressly declare that if an assignment is made, the policy shall be void, and such a provision will be enforced.[24] However, if the policy provides merely that notice of an assignment must be given to the insurer, and that, if no notice is given the assignment is void, such a provision is designed merely to protect the insurer and an assignment without notice will be protected in equity.[25]

(3) Assuming that the policy does not forbid an assignment, two kinds of assignments may be made: conditional and absolute. It is well settled that a conditional assignment may be made, even to one having no other insurable interest in the life insured than that growing out of this particular transaction.[26] It is an everyday occurrence for a man to borrow money on his life insurance, that is, to deliver his insurance policy to the lender as collateral security for a loan. In such a case, it is clear that the lender has an insurable interest in the life of the debtor, because he is his creditor.

However, let us assume that the assignment is absolute and irrevocable. In such a case, the assignee may have an insurable interest in the life of the assignor. If he has, there is no objection to the assignment. He may recover to the same extent as if the insurance had been issued in his favor originally. But if the assignee has no insurable interest, an absolute assignment brings us into the midst of a conflict of authority. The United States Supreme Court has declared an assignment open to the same

[24] Unity, etc., Assn. v. Dugan, 118 Mass. 219.
[25] N. Y. Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742.
[26] Mut. Ben. Life Ins. Co. v. First National Bank, 69 S. W. 1 (Ky.).

objection as the taking out of a policy originally in the assignee's name.[27] If so, the assignment is void in this case. There is much authority to the contrary, however, though all courts would, no doubt, agree that if a policy is taken out with the intention of assigning it, at once, to Y, who has no insurable interest in the life of X and could not have been the original beneficiary, such a transaction is void because it involves an attempt to evade the requirement of insurable interest. However, if the assignment is made in good faith, many courts uphold it, though it is absolute and though the assignee has no insurable interest in the life insured.[28]

The practical importance of the problem is this: Most life insurance policies provide for a surrender value. For example, X, 35 years of age when insured for $10,000, may be entitled, upon surrendering his policy at the end of seven years, to receive $900 from the company. In many cases X will have a friend, Y, who will insist that the company is not offering him as much as it should. Furthermore, X may be dying of consumption and in serious need of ready cash. Why not permit X to sell the policy to Y absolutely, for $1,000? To forbid this is to give the insurance company a monopoly of purchase.

[27] Warnock v. Davis, 104 U. S. 775, LEADING ILLUSTRATIVE CASES.

[28] Steinback v. Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, LEADING ILLUSTRATIVE CASES.

CHAPTER VII.

BENEFICIARIES.

37. **Introduction.**—It is not customary to speak of the equitable interest in property unless the legal title and equitable interest are in different persons. It is equally true that, in insurance, we do not generally speak of a beneficiary unless the insured and the beneficiary are different persons. The insurer is the party who agrees in consideration of a small sum called the premium to pay a much larger sum when the event insured against occurs. The one who procures the insurance and pays the premium is called the insured. The one to whom the insurance money is to be paid is called the beneficiary. At least in life insurance, we may have a fourth party. For example, Mrs. A insures the life of her husband, A, senior, in favor of the son, A, junior. Here Mrs. A is the insured and A, junior, is the beneficiary. What shall we call A, senior? In view of the fact that usage has not sanctioned a better term for him, we may designate A, senior, as the life insured, or, simply, the life.

38. **Property insurance—Owners of limited interests.**—Two questions of importance have arisen in regard to the rights of beneficiaries in property insurance: (1) in the case of owners of limited interests, and (2) in the case of mortgagors and mortgagees.

Much confusion has arisen in cases involving insurance by lessees, life tenants, bailees and other owners of limited interests. Take the case of the life tenant. Two questions are presented: (1) How much can he recover? (2) If he recovers more than the estimated value of his interest, must he hold the excess in trust for the remainderman? The decisions are in conflict on both questions. (1) It has been held that the life tenant can recover only the value of his life estate.[29] On the other hand, there are authorities which hold that he may recover to the full extent of the value of the property destroyed,[30] and this is the rule by the weight of authority. (2) If we allow the life tenant the full value, shall he be permitted to put all the money in his pocket? If so, would we not give too great an incentive to arson? The Massachusetts court does not think so, but allows him to pocket all the money and allow the remainderman no benefit therefrom.[31] However, there are contrary decisions which require the life tenant to hold the excess, over the value of his interest, in trust for the remainderman, unless the money is used to rebuild.[32] If the life tenant rebuilds, he will, of course, hold the new building only for life and it will then go to the remainderman. Such a rule is eminently just, particularly when the life tenant has agreed with the remainderman to keep the property insured.[33]

[29] Beekman v. Ins. Assn., 73 N. Y. Supp. 110, 66 App. Div. 72.

[30] Merrett v. Farmers' Ins. Co., 42 Iowa 11.

[31] Harrison v. Pepper, 166 Mass. 288, 44 N. E. 222, LEADING ILLUSTRATIVE CASES.

[32] Sampson v. Grogan, 21 R. I. 174, 44 L. R. A. 711.

[33] Convis v. Citizens' Mutual Fire Ins. Co., 127 Mich. 616, 86 N. W. 994.

39. **Same subject—Mortgagors and mortgagees.** —Four situations have arisen involving the rights of mortgagors and mortgagees. (1) The mortgagor may insure his interest in the property without regard to the mortgage and without any contract with the mortgagee to effect insurance. In this case, if the property mortgaged is destroyed, the lien of the mortgage does not attach to the insurance money, though the rule is, no doubt, otherwise if the mortgagor is under contract with the mortgagee to insure.[84] (2) The mortgagee may do likewise. He may insure his interest without regard to the mortgagor and without any contract requiring him to insure. In the chapter on Insurable Interest we found that a mortgagee has an insurable interest and, in the chapter on Subrogation, that, by the great weight of authority, the insurer on indemnifying the mortgagee, in this case, succeeds to the latter's rights under the mortgage.

(3) We shall now consider the most common form of insurance of mortgaged property. Generally, the mortgagor agrees in the contract of mortgage to keep the premises insured in the sum of not less than a certain stated amount, which generally equals or exceeds the amount of the loan. The policy is made payable to the mortgagee "as his interest may appear," and the balance, if any, to the mortgagor. The interest which the mortgagee may appear to have is, of course, equal to the amount due on the loan at the time of the fire. When the mortgagor is making weekly or monthly payments to the mort-

[84] Farmers' Loan & Trust Co. v. Penn Plate Glass Co., 186 U. S. 434.

gagee, the interest of the latter is changing constantly and may disappear entirely before the fire. Hence, instead of attempting to state exactly in figures the amount of the mortgagee's interest, the "as his interest may appear" clause is used. In this case, and, in fact, in any case in which the mortgagor agrees to keep the interest of the mortgagee insured, the insurance money is subject to the claim of the mortgagee[35] and no right of subrogation is given to the insurer unless it is expressly agreed that the right shall exist.[36] The mortgage debt becomes paid to the extent that the mortgagee receives insurance money. (4) The fourth case is that in which the mortgagee takes out insurance for the benefit of himself and the mortgagor. Frequently, it is provided in the mortgage that, if the mortgagor does not insure, the mortgagee may procure the insurance and add the charges to the mortgage debt. The mortgagee should, and probably must, take out this kind of insurance in such a case. The result here is the same as in sub-section 3 next preceding. Payment to the mortgagee discharges the mortgage debt pro tanto; no subrogation is allowed, except by agreement.

Acts of the mortgagor. If the insurer can show that the owner of property intentionally set fire to his house or violated a term of the policy it is clear that the owner cannot recover his insurance. But will this prevent the mortgagee, insured by the same policy, from recovering? If the mortgagee is but a beneficiary under a contract made between the

[35] Wheeler v. Ins. Co., 101 U. S. 439.
[36] Springfield F. & M. Ins. Co. v. Allen, 43 N. Y. 389, 3 Am. Rep. 711.

insurer and the insured, the mortgagee would, no doubt, be denied recovery.

This situation is generally provided for, however, by an express provision in the policy, either protecting the insurer by making all conditions in the policy applicable to both the mortgagee and mortgagor, or protecting the mortgagee by providing that the interest of the mortgagee shall not be invalidated by any act of the mortgagor, except the nonpayment of the insurance premium.[37]

40. **Life insurance.**—If A procures an ordinary life insurance policy in favor of his wife, B, and does not reserve the right to change the beneficiary, what is the nature of B's rights? Disregard the fact that A and B are married, as we may today in most states. (1) It has been suggested that B is in the same position as if A had made a will bequeathing her a sum of money. However, this is not true for the reason that B acquires rights before A dies. A cannot defeat B's rights at any time by substituting someone else in her place. Had A made a will, he could, generally, revoke it at any time and B would acquire no rights thereunder until A dies. (2) It would prove unfruitful to compare B to an assignee and A to the assignor of a chose in action. Such an assignee must sue in the assignor's name, while B sues, at law, in her own name. Furthermore, the right did not move from A to B, but from the insurer to B. In many of these cases, there has never been an instant when any right against the insurer resided in A. (3) The term "beneficiary" may lead us to assume that B's

[37] Smith v. Union Ins. Co., 25 R. I. 260, 55 Atl. 715.

position is that of a cestui que trust or beneficiary of a trust. This is not true because a cestui que trust cannot, as a rule, institute an action at law against the obligor. B has no difficulty in most jurisdictions in bringing an action at law against the insurer. (4) It has been suggested that A, in taking out this insurance, acted as agent of B. This is contrary to fact. When a man buys a box of candy for his wife he is not acting as her agent, necessarily. This is equally true when he buys insurance. He may be, but is not always, her agent in such cases. (5) Another suggestion is this, that when A delivers the policy to B, it becomes an executed gift, as in the case when he hands over the box of candy. Now it is axiomatic that after giving the candy to B, he cannot take it back at will, and we have found in subsection 1 that the same rule applies to B's rights. The bottom falls out of this theory, however, when we learn that an insurance policy need not exist to give B her rights; that the contract need not be reduced to writing, and that B's rights vest as soon as the contract is complete, even though she may never hear of the contract nor see the policy.[38] (6) We may feel that B is in the position of one for whose benefit a contract has been made and may be allowed to sue the promisor under the rule in Lawrence v. Fox.[39] This case is familiar to all students of the law of contracts. It allows X to sue Y for the breach of a promise made for the benefit of X in a contract

[38] Lemon v. Phoenix Mut. Life Ins. Co., 38 Conn. 294, LEADING ILLUSTRATIVE CASES.

[39] Lawrence v. Fox, 20 N. Y. 268.

between Y and Z. At least one good reason makes this comparison odious. Though under the rule in Lawrence v. Fox it is generally recognized that, at least, before X assents to or acts upon Y's promise, Z may release Y from liability to X without the consent of X, A cannot release the insurance company from liability to B without B's consent, even though B did not hear of the insurance. (7) The rights of the beneficiary of life insurance are frequently said to be vested. This statement must be made with a word of caution. In the vague, popular, and political sense in which the word "vested" is used, we may say that B has a vested right; that is, a right of property which the law will protect. But in the sense in which the word "vested" is applied to estates in remainder in real property, the interest of B can hardly be considered vested. It is subject to many contingencies, particularly the non-payment of premiums. Though the right of B exists, A is not compelled to pay future premiums. Furthermore, A, by going to the Philippines, may violate a term in the policy and thus render it void.

In conclusion, it may be said that the rights of a beneficiary in life insurance are anomalous and peculiar and cannot be disposed of on general principles applicable to any other single relationship. However, there are points of resemblance between other legal positions and that of the beneficiary.

41. **Same subject—Beneficiary designated unconditionally.**—The following discussion may enable us to determine more definitely the exact nature of the interest of a beneficiary unconditionally designated.

Murder of insured by beneficiary. If A gives B a box of candy and then is murdered by B, it is clear that the title to the candy does not then revert to A's estate. On the other hand, it is equally well settled, by the weight of authority, that if A, by will, leaves property to B and is then murdered by B, B will not be permitted to take a beneficial interest in the property devised or bequeathed.

Which of these cases does life insurance resemble? Assume that A insures his life in favor of B, who murders him ten years thereafter. Shall we say that B's interest became absolute when the contract is made, or, as in the case of the will, upon A's death? In this respect, life insurance policies resemble wills. B cannot recover the insurance.[40] This rule applies though the beneficiary has not been designated unconditionally and the power to change the beneficiary is reserved. However, the strongest case in the beneficiary's favor is that wherein he is unconditionally designated. Nevertheless, he fails in this case also.

Transfer of interest. The beneficiary, unconditionally designated, may transfer his or her interest without the consent of the insured unless, by statute, such consent is required, as, for example, where the beneficiary is the wife of the insured and the consent of the latter, as husband, is made necessary. The beneficiary's right may be regarded as a chose in action for this purpose.[41]

Death of beneficiary. To return to our box of

[40] N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591.

[41] Hewlett v. Home for Incurables, 74 Md. 350, 17 L. R. A. 447.

candy, if A gives it to B and then B dies, it goes to B's personal representative and does not revert to A. The same rule applies, by the weight of authority, where A procures insurance on his life for B. However, owing to the seeming injustice of letting such an investment go to the wife's relatives when A has sunk his money into it and may not have been on good terms with the persons who would otherwise reap the benefit, many courts have held that the right in B terminates with her death, on the ground that this was the intention of the parties, and such is the rule by statute in certain states.

42. **Same subject—Rights of beneficiary subject to a condition.**—It is extremely common for a man to procure life insurance payable to B, the wife of the insured, if living, or otherwise to C and D, their children. Here it may be observed that the insured reserves no right to change the beneficiaries, though the rights of C and D are contingent.

After making this wise provision for his family it is, regrettably, too common that the husband and wife find themselves in financial embarrassment a few years thereafter and decide to secure the surrender value of the policy. But where the insurer allows a surrender he must generally obtain a release from a beneficiary unconditionally designated. It would seem, therefore, that unless C and D join in the release and are legally capable of doing so, their rights will not be defeated by a release given by the husband and wife. The insurer would take such a release at his peril. If B outlived the husband, the insurer would be protected, but not otherwise. The

difficulty in this case is further increased when the insurance is payable, if the wife be not living, to the children generally. This would include those born and unborn at the time the policy is issued.

43. **Same subject—Right to change the beneficiary reserved.**—In many cases, the policy designates someone as beneficiary, with right of revocation reserved to the insured. It might be held that B here takes a property right which differs from that of a beneficiary unconditionally designated in but one respect, namely, that the right may be revoked, and that until revocation B has a property right. But the rule appears to be the other way. B's right is regarded not as a property interest, but as a mere possibility.

This is the rule which is generally applied to all beneficiaries in mutual benefit associations. Such associations are organized, in theory, not for purely commercial reasons, but for the mutual benefit of their members. Their purposes are social and benevolent. Hence, we find that the payment of a so-called death benefit is looked upon not as a matter of strict legal necessity, but as evidence of fraternal affection. Nevertheless, there are limits to such affection on the part of members. Though a daughter designated as beneficiary pays all dues and assessments for several years for the sake of retaining her mother's membership in a mutual benefit association, the mother may, notwithstanding, deprive her daughter of all interest and designate another person as beneficiary and thus leave the daughter without remedy unless there has been a contract made

between the daughter and mother binding the mother not to change the beneficiary.[42] This may appear harsh, but the time may never come when persons, who donate their property in the hope of having the donees give more in return than such donees receive, will be entitled to relief at law.

In many instances, the association requires a member to comply with certain formalities before making a change of beneficiaries. Thus, the member may be required to produce and surrender the certificate. Such rules may be enforced by the association.

In many cases of this character the first beneficiary refuses to surrender the certificate. But if the association does not object to a failure to comply with such requirements, the prior beneficiary cannot protect himself by setting up such regulations in his own behalf. Such provisions are designed for the protection only of the association. In many cases, the association pays the money into court and allows the controversy to proceed between the rival beneficiaries. Not only are such provisions of no protection to the prior beneficiary, but it has been held that where the member does all that he can do to make a change, the association will be denied any defense on this ground, if no other steps than mere office details of the association remain to be completed when the member dies.[43]

But suppose that the change from B as beneficiary to C as beneficiary has been induced by fraud, or that the member was insane when he made the alteration.

[42] Jory v. Supreme Council A. L. H., 105 Cal. 20, 26 L. R. A. 733, 38 Pac. 524, LEADING ILLUSTRATIVE CASES.

[43] McGowan v. Order of Foresters, 104 Wis. 173, 80 N. W. 603.

Let us assume, furthermore, that if no one else is designated, the money will go to the personal representative of the member. Has B sufficient interest here to allow him to object to the fraud or set up the insanity? Or, is the personal representative the only one who can raise the question? It has been held that B has sufficient interest for this purpose.[44]

44. **Same subject—Surrender value.**—Where a beneficiary has been unconditionally designated and all the premiums have been paid by the insured, who is entitled to the money paid by the insurer upon the surrender of the policy? The answer to this question is that the rule appears to be that unless the contract makes provision for surrender value, or unless a statute creates it, the right to any payment on surrender does not exist. The rights of the insured and beneficiary would cease on failure to pay a premium after it falls due; or, at least, no return of cash could be demanded.

Therefore, since surrender value is purely a matter of contract, it is governed entirely by agreement. But it is possible that the policy may provide for surrender value without specifying to whom the money is to be paid. In such a case the party entitled to receive the money paid by the insurer must be determined solely by the agreement among the parties at the time of the surrender. When the beneficiary is unconditionally designated he may demand at least a share of the money, because his consent is generally necessary to make the surrender effective.[45]

[44] Grand Lodge A. O. U. W. v. Frank, 133 Mich. 232, 94 N. W. 731, LEADING ILLUSTRATIVE CASES.

[45] D'Arcy v. Conn. Mut. Life Ins. Co., 108 Tenn. 567, 69 S. W. 768.

CHAPTER VIII.

CREDITORS.

45. **Introduction.**—In the chapter on insurable interest, the interest of a creditor in the life or property of his debtor was ascertained. However, we have not considered the rights of creditors to levy execution on rights under insurance policies, nor the ability of the creditor to obtain all of the amount of a policy which he has procured on the life of his debtor.

46. **Property insurance.**—Creditors of one who has insured his property may attempt to seize the rights of the latter under the policy either before or after the property is destroyed.

(1) *Before loss.* Assume that a debtor owns a building in one state but keeps his fire insurance policy in another state in which he and his creditor reside, and also the insurer, and that the policy insures the building for five years. It is customary, in fire insurance policies, to provide for a repayment of any unearned portion of the premium upon a cancellation of the policy and for a right of cancellation by either the insurer or the insured upon five days' notice. Can the creditor, in such a case, force a cancellation and payment over to him of this unearned portion of the premium? There appears to be no reported case in which this question has been decided. We might complicate matters by assuming that the

building is the homestead of the insured and is exempt from the claims of creditors. This proposition may never be determined owing to the small amount which is generally involved.

(2) *After loss.* After the loss occurs, the right to the insurance money is regarded as vesting in the debtor. Being a chose in action in which the insurer is the obligor, the creditor may institute the usual proceedings in such cases for attaching it. But there is difficulty here, if the property destroyed is exempt from seizure by creditors. Though there is a conflict of authority, the generally accepted rule is that if the property destroyed is exempt, the insurance is also free from seizure.

However, the following qualifications have been annexed by certain courts to the rule that such insurance money is exempt: (a) The owner must intend to reinvest in similar property.[46] (b) The debtor has a reasonable time within which to use the insurance money to replace the exempt property if he has not used other means for this purpose.[47]

47. **Life insurance.**—The rights of creditors in the insurance on the life of the debtor vary in the three following classes of cases: (1) Where the insurance is made payable to the estate of insured; (2) where the insurance is made payable to one other than the debtor or creditor; (3) where the insurance is made payable to the creditor.

48. **Same subject—Debtor as the beneficiary.**—Where insurance on the life of X is made payable

[46] Puget Sound, etc., Packing Co. v. Jeffs, 11 Wash. 466; 27 L. R. A. 808.

[47] Cooney v. Cooney, 65 Barb. 524 (N. Y.). The rights of mortgagees as creditors were discussed in the previous chapter on Beneficiaries.

to the debtor, D, and has been procured by a third party, T, the creditor, C, of the debtor-beneficiary may be unwilling to await the death of X in order that he may satisfy his claim out of D's rights to the insurance.

If the insured has reserved the right to change the beneficiary, it is clear that C can secure nothing before the maturity of the policy.

If D is unconditionally designated and the policy has not matured, C could get nothing from the insurer if there is no surrender value. But if the policy has a surrender value, and the insurer is bound to pay the money on surrender to D, the creditors could, no doubt, obtain this amount, unless a statute prevents it, as, for instance, in proceedings in bankruptcy.

However, D may be the insured, and also the one to whose estate the insurance is to be paid on the death of X. There is probably no difference between this case and one in which D insures his own life under the same circumstances. If the policy has matured and the rights of D have thus vested, the creditors will have no difficulty in securing the money. But if the policy has not vested, there are at least two possibilities which may arise: the policy may have a surrender value, or it may not.

The following rule, established in the present National Bankruptcy Act, is just and in accord with the probable rule in the absence of statute. This act requires that insurance shall pass as assets to the trustee for the benefit of creditors if it has a cash surrender value payable to the bankrupt, his estate,

or personal representatives.[48] If it has no surrender value the creditors derive no benefit from it, since it is not regarded as part of the bankrupt's assets.[49]

The bankrupt law, in addition to the foregoing requirement, makes a salutary provision for the redemption of the bankrupt's life insurance by paying the amount of the surrender value to the trustee within a limited time after bankruptcy.

49. **Same subject—Debtor as the insured.**—A knowledge of the law of trusts is necessary to solve the problem which arises when a man steals money and buys with it life insurance payable either to himself or to a third party. To express an opinion as to what is the sound rule on the question would be merely a statement of what one thinks the law of trusts ought to be in this class of cases. Where the thief uses the stolen money to pay premiums on insurance already issued, there is some confusion, not peculiar to insurance law, and capable of solution by the application of the principles found in the law of trusts and property. Investment in life insurance is but one form of investment, which may yield immense profits to the investor.[50]

The following question in regard to a debtor as the insured has caused much conflict of opinion: Can a man who knows he is insolvent procure insurance in favor of those who are dependent upon him for support? Two or three principles should first be stated before attempting a solution of this ques-

[48] National Bankruptcy Act of 1898, § 70 (5).

[49] Morris v. Dodd, 110 Ga. 606, 50 L. R. A. 33.

[50] Holmes v. Gilman, 138 N. Y. 369, 20 L. R. A. 566, 34 N. E. 205, LEADING ILLUSTRATIVE CASES.

tion. (1) Though the principles which have grown up around the rule forbidding fraudulent conveyances are very rigid in regard to gifts of one's property when one knows he is insolvent, such rules, in the interest of humanity and justice, would probably never be carried to the extent of making it either criminal or fraudulent for any purpose for an insolvent debtor to make very modest presents, at least at certain seasons of the year, to his wife or children. (2) The luxuries of yesterday become the necessities of today. Though silk hose may have been the mark of aristocracy two hundred years ago they have lost their probative force. And so it has been with life insurance. At first though it may have been a luxury indulged in by the few, today it may be regarded as in every sense of the word a household necessity. The force of this statement is perceived when the slight annual cost of many forms of life insurance is considered.

Hence, we should not be surprised to find that the United States Supreme Court has decided that a married man, though insolvent, may rightfully devote a moderate portion of his earnings to the insurance of his life, and thus make reasonable provision for his family after his decease, without being guilty of defrauding his creditors, provided no such fraudulent intent is shown to exist in fact or can be inferred from the surrounding circumstances.[51] In other words, the fact that he is insolvent in such a case is not conclusive evidence of fraud. Actual fraud must be shown to enable the creditor to have the

[51] Washington Bank v. Hume, 128 U. S. 195

transfer set aside as fraudulent. Though this decision has been criticized[52] on the ground that it is a piece of judicial legislation, it has been followed in several states.

If the debtor is not insolvent when he effects the insurance, but later becomes insolvent, the position of the creditor is not so strong, and must be determined in the light of the general rules which have been established in connection with the statute of 13 Elizabeth in regard to fraudulent conveyances.

50. **Same subject—Creditor as the insured.**—When the creditor procures insurance on the life of the debtor, shall the creditor be permitted to keep all of the insurance, even though the debt has been paid in full?

If we adopt the theory that life insurance is a matter of investment as well as a matter of indemnity, there appears to be no objection to allowing the creditor to retain all the proceeds from the insurance. This rule has been adopted by many courts.[53] Other courts have reached a contrary opinion[54] and allow only indemnity, particularly where the debtor has taken out insurance in favor of his creditor as beneficiary.[55] In such cases they allow the creditor only indemnity and give the surplus, if any, to the debtor's estate. But cases in which the debtor is the insured may be distinguished readily from those in which the creditor himself takes out the insurance and

[52] 25 American Law Review, 185.

[53] Amick v. Butler, 111 Ind. 578, 12 N. E. 518, LEADING ILLUSTRATIVE CASES.

[54] Goldbaum v. Blum, 79 Tex. 638, 15 S. W. 564.

[55] Crotty v. Union Mut. Life Ins. Co., 144 U. S. 621.

bears the expense. In this case, to allow the debtor's estate to have the surplus is to give property to persons who would have difficulty in proving their moral right to it. It would be equally just to allow the insurer to retain it.

51. **Same subject—Statutory exemption.**—Very sweeping statutory provisions exist, in many states, either for the exemption of all beneficiaries of life insurance, or, at least, the wife and children of the insured. These statutes might suggest to an unscrupulous and insolvent person the desirability of investing all his belongings in a very short-term endowment policy in favor of his wife. Thus, in a few years, by the grace of his wife, he would be enabled to enjoy his belongings free from the pressure of his creditors. However, a Nebraska court has declared endowment insurance to be a loan rather than a case of insurance and regards the insurance in such a contract as a mere incident and insufficient to exempt the rights of the beneficiary from the claims of the husband's creditors.[56]

In another case, the proceeds of life insurance were exempted, by statute, from the debts of the decedent. In the insured's last illness, X nursed him. Later, Y buried him. It was held that Y's but not X's claim should be satisfied out of the insurance money. Y's claim for funeral expenses had never been a debt against the insured, but only against his estate.[57]

[56] Tolcott v. Field, 34 Neb. 611, 52 N. W. 400.
[57] Dobbs v. Chandler, 84 Miss. 372, 36 South. 388.

PART III

THE SEVERAL FORMS OF INSURANCE

CHAPTER IX.

FIRE INSURANCE.

52. **The fire insurance business.**—Approximately nine-tenths of all the fire insurance business in the United States is in the hands of ordinary corporations or stock companies. Their combined assets amount to more than a half billion dollars.

Two other forms of organization are known. There are over a thousand organizations doing business on the mutual basis; that is, without the intervention of stockholders and without any other liability upon which to rely except that of the organization's members, all of whom are insured in the "mutual." This form has been particularly successful in the case of the "factory mutuals," organized for the mutual protection of factory owners, and very active in fire protection. This form is also much used by farmers.

The last form to be noticed is the "Lloyd's Association," a kind of partnership concern, named and modeled after the successful British organization.

53. **Form of policy.**—In most states the form in which a fire insurance policy shall be drawn is left

to the agreement of the parties, subject only to minor regulations by statute. However, in about one-third of the states[58] the legislature has prescribed a certain form, known as a standard form of policy, to which all fire insurance policies issued within the state must conform. These forms vary considerably. At the same time there are clauses and expressions which are about the same in most of them. The more important of these, as construed by the courts, will be considered in this chapter.

54. **Effect of breach.**—It is customary to provide that the entire policy shall be void if, for example, the insured is not the sole owner of the property insured, or if he allows benzine on the premises. Since the word "entire" is used it has been held that where a man insured, under the same policy, beds and furniture which he did own, and a piano which he did not own, he could not recover anything because he was not the sole owner of the property insured.[59]

If the term "void" is construed strictly in the insurer's favor, a man cannot recover his insurance if he has allowed benzine on the premises for a few minutes several years before the fire occurred, but not afterwards. Accordingly, many, though not all, courts have held that a temporary breach, as in the case assumed, merely suspends the insurance while the benzine is on the premises.

55. **Location.**—The policy generally insures the

[58] Connecticut, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, West Virginia and Wisconsin.

[59] McWilliams v. Cascade Fire & M. Ins. Co., 7 Wash. 48, 34 Pac. 140.

property only while it is located and contained as described in the policy and not elsewhere. If this clause is to be construed literally and strictly, one could not recover his insurance on his clothes when described as located within a house, if they burned while drying on the clothes line in the back yard. There is a decision to this effect.[60] Courts, however, have been more liberal, particularly when the words "and not elsewhere" are omitted, and hold, where the use of the goods is not customary without a temporary removal, that such removal does not relieve the company from liability, even if the goods are destroyed in their temporary resting place.[61]

56. **Ownership and change of ownership.**—It is generally requisite that the interest of the insured be that of "sole and unconditional ownership," and if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage, or if, with knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale, by virtue of any mortgage or trust deed, the policy shall be or become void.

The courts have been very liberal in regard to ownership on the part of the insured. A mere leasehold on the land on which the building insured is situated is insufficient because of an express provision in most policies. But if the layman, as distinguished from the professional lawyer, would regard the insured as the owner of the property and the loss by fire would fall on him, the courts are inclined

[60] Leventhal v. Home Ins. Co., 66 N. Y. Supp. 502, 32 Misc. 685.
[61] Niagara Fire Ins. Co. v. Elliott, 85 Va. 962, 9 S. E. 694.

to allow the insured to recover his insurance even though there is a cloud on the title.

As to mortgages, it must be noted that these need not be disclosed unless the property is personalty. A curious construction to the foreclosure provision has been given by certain courts. This policy reads, "if, with the knowledge of the insured, foreclosure proceedings be commenced." They have held that to invalidate the policy, the knowledge must precede the commencement of proceedings, and if the knowledge does not exist until after the commencement, this clause does not affect the validity of the policy.[62]

57. **Other insurance.**—It is now generally provided that the policy shall be void, "if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy without agreement indorsed hereon or added hereto." The objection to other insurance is based on the danger of over-insurance. Over-insurance is a very strong incentive to arson.

The expression, "whether valid or not," was not inserted until after many courts had held that the first policy was not avoided if the second was invalid; for example, because the latter contained a clause making the second itself void if there was any other insurance on the property when the second was issued. Other courts had held that the first became void as soon as the second was issued, and therefore recovery was allowed on the second.

[62] North British & Mercantile Ins. Co. v. Freeman, 33 S. W. (Tex. Civ. App.) 1091.

It is obvious that the other insurance, to be of consequence in this connection, must cover the same character of loss. Fire insurance would not be invalidated by tornado insurance not embracing fire losses.[63]

Another phrase which was hit upon only after much litigation is, "in whole or in part." Before this provision was inserted it had been held that there was no other insurance within the meaning of this clause unless it covered identically the same property.

Suppose that the owner of an undivided half interest in a house insures his interest and then the other half owner insures his half, have we a violation of this clause? It is held that this is no violation, since separate interests are insured. This is equally true where mortgagor and mortgagee insure their interests separately.[64]

58. **Co-insurance.**—Co-insurance exists when more than one valid policy covers the same loss. For example, A insures his $3,000 house with B for $1,000 and with C for $1,500. In such a case, in the absence of any stipulation to the contrary, A may recover the full amount of a loss of less than $1,000 from either B or C, and let them look to each other for contribution. However, it is frequently provided in the policy that A can hold each liable only for his pro rata share.

Regardless of the rule in marine insurance, it is well settled that where A insures his $3,000 house

[63] Australian Agr. Co. v. Saunders, L. R. (1875) 10 C. P. 668 (Eng.).
[64] Home Ins. Co. v. Koob, 24 Ky. Law Rep. 223, 58 L. R. A. 58.

with but one insurer, D, for $2,000, and the house is damaged to the extent of $1,000, A may recover the full $1,000 from D.[65] At times there are inserted co-insurance clauses which require A, in such a case, to insure the property for as much as, for example, eighty per cent. If he fails to do this before the fire and a $1,000 loss occurs, D would be liable only for the amount for which he would have been ultimately liable in contribution if A had insured with another, E, up to the amount of eighty per cent.

59. **Various forbidden increases of risk.**—It is generally provided that the policy shall become void if the hazard be increased by any means within the control or knowledge of the insured. Whether or not there has been an increase of risk is a question of fact in each case, and is generally a matter for the jury to decide, under all the circumstances of the case. The courts have held, very properly, that to constitute an increase which will avoid the policy, it must be substantial and not of a highly temporary character.

It will be observed that the risk must be within the insured's knowledge or control. If literally construed, the storage of gunpowder or dynamite a half a mile from the premises insured, to the knowledge of the insured, might avoid the risk. To prevent such a result, one court has, rather arbitrarily, declared that the increase must occur upon property under the control of the insured; that is, upon the very premises of the insured.[66]

[65] Wiggin v. Suffolk Insurance Co., 18 Pick. 145 (Mass.), 29 Am. Dec. 576.
[66] State Ins. Co. v. Taylor, 14 Colo. 499, 24 Pac. 333.

The fact that the insured conducts himself negligently, even for a few minutes, may increase the risk and cause a fire. However, it is generally held that the negligence of the insured is one of the very things insured against. For example, where he used kerosene, on only one occasion, in his efforts to kindle a fire, recovery was allowed.[67] But where the negligent use of kerosene becomes a habit and displays itself in the keeping of a jug containing crude petroleum in a room full of merchandise, it must be left to the jury to determine whether the risk has been materially increased.[68]

Making repairs. In several, though not all, of the standard policies, express provision is made for the avoidance of the policy "if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time." It is generally held that unless an express provision of this character is inserted in the policy, the making of repairs is not necessarily an increase of risk. Though in one case the court seized upon the word "mechanics," and held that common painters are not mechanics,[69] in another case it was held that polishing woodwork and reburnishing fixtures, if continued for more than fifteen days, avoided the policy.[70] This clause is designed to require the insured to get the permission of the insurer before commencing repairs of a very extensive character.

[67] Angier v. Western Assur. Co., 10 S. D. 82, 71 N. W. 761.
[68] Williams v. People's Fire Ins. Co., 57 N. Y. 274.
[69] Smith v. German Ins. Co., 107 Mich. 270, 30 L. R. A. 368.
[70] German Ins. Co. v. Hearne, 117 Fed. 289, 59 L. R. A. 492.

Dangerous substances. It is provided, in the New York standard form, that the policy shall be void "if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or any other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States Standard (which last must be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light)."

The phrase, "any usage or custom to the contrary notwithstanding," was inserted to avoid the ruling of the courts that if, for example, a printing office was insured, and if it was customary to use camphene in the business, a prohibition against camphene is of no consequence.[71] It was held, in one case on this principle, that the insurance of a retail hardware store allowed the owner to keep dynamite on the premises.[72] The insurance companies thought they would settle matters, once and for all, by inserting this clause that usage to the contrary is of no consequence. However, this provision has, apparently, not altered the situation a particle.

Two closely related reasons for the position of the courts on this matter have been suggested. (1) Writ-

[71] Harper v. N. Y. City Ins. Co., 22 N. Y. 441.
[72] Phenix Ins. Co. v. Walters, 24 Ind. App. 87, 56 N. E. 257.

ing controls printing. The clause in regard to benzine, benzole, and the rest is printed. The description of the property is generally written into the policy either with a pen or a typewriter. (2) There is a repugnancy in insuring a printing office and forbidding camphene. As has been forcibly suggested, don't insure a match factory and expect it to be run as waterworks. Either a printing office, including its camphene, has been insured or it has not. We should construe the policy most strongly against the insurer, the party who draws it up. Another principle in this connection may for good reason remind us of the laxity of Rip Van Winkle, though the justice of the rule is evident. Though the policy forbids ether, a little does not count. For example, a small quantity of any of the forbidden substances, if used for medicinal purposes, does not avoid the policy. The word "used" has been turned to the advantage of the insured and has been held to be a provision against danger arising merely from "habitual, constant, or continued exposure" of the property through the presence or use of the articles enumerated.[73] In like manner, "keep or have" has been held to refer only to permanent and habitual storage of articles, and not to a mere temporary use.[74]

60. **Vacancy of premises.**—There is considerable variety in the vacancy clauses of the various policies. The New York form provides that the policy shall be void, "if a building herein described, whether intended for occupancy by owner or tenant, be or

[73] Springfield F. & M. Ins. Co. v. Wade, 95 Tex. 598, 58 L. R. A. 714.
[74] Bentley v. Lumbermen's Ins. Co., 191 Pa. St. 276, 43 Atl. 209.

become vacant or unoccupied and so remain for ten days."

The general purpose back of this clause is to prevent an increase of risk which insurance companies, apparently, believe exists when the buildings are deserted and, consequently, are likely to receive no personal care and may become the nesting places of tramps. Let us consider the more important phrases in this clause, in the order in which they appear.

"Whether intended for occupancy by the owner or tenant" was inserted because the courts held that what would be vacancy if one insured his own private residence would not necessarily amount to vacancy if the property was described as a building generally designed for rental purposes. It was said that if one insures his building as a tenement house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises and that more or less time might elapse before the owner could procure another tenant to occupy them.[75] To prevent this construction the phrase in question was inserted. However, from what we learned in the previous section about the way in which the phrase, "any usage to the contrary notwithstanding," was construed, we might be led to expect that the courts would hold that if the building is described as a tenement house, there is repugnancy here and that the description controls. This rule of interpretation is apparently not accepted as yet.

[75] Hotchkiss v. Phoenix Ins. Co., 76 Wis. 269, 44 N. W. 1106.

"Be or become" needs but little explanation. It is curious that the Massachusetts standard policy here uses but one word and that is, "become." Thus, the way is open for one to contend in Massachusetts that if the premises be vacant when insured and up to the time when the fire occurs that the policy is not void. This contention would probably be successful in some jurisdictions,[76] though it would not hold good in all.[77]

"Vacant *or* unoccupied" is the phrase in the New York standard today. The Massachusetts standard speaks of vacancy "by the removal of the owner or occupant." At one time the customary phrase was "vacant *and* unoccupied." In all probability the person who first inserted these words in a policy did so in deference to the tautological manner of the old conveyancer, who used ten words where one would do, and not with any thought of a possible difference between vacant and unoccupied. However, when the conjunction "and" was used, the courts insisted upon making a distinction between the two terms and held that, to avoid the policy, premises must be both vacant and unoccupied. Force, they held, should be given to both words.

"Vacant" means empty, deprived of its contents, not filled. Furthermore, it involves the idea, not of temporary, but of permanent removal.[78] The intention of returning must be absent.

On the other hand, the word "unoccupied" is applicable when a temporary removal occurs; for

[76] Aurora F. & M. Ins. Co. v. Kranich, 36 Mich. 289.

[77] Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 11 L. R. A. 598.

[78] Thomas v. Hartford Fire Ins. Co., 21 Ky. Law Rep. 914, 53 S. W. 297.

example, in the case of a dwelling house, from which the family has removed, leaving a portion of the household goods in the building. It will not be vacant, but occupation is at an end when it is no longer the abode of any living person. A temporary absence of the family will not avoid the policy. They may absent themselves for purposes of health, pleasure, business, or convenience for any reasonable period, if they go with the intention of returning again, and the building insured continues to be their home.[79]

As stated above, unoccupation is but a temporary removal. In determining what constitutes vacancy or unoccupation, it is well settled that the character of the customary use must be considered, especially when the building is not used for residence purposes. For example, a church building kept for use for the purposes for which it is designed, and used as occasion presents, and as the convenience of the congregation may require, and no intent appearing to abandon it for the purposes of its use by the temporary periods of nonuser, even though such periods exceed the forbidden limit in the policy, is not necessarily leaving the church building vacant and unoccupied, nor, perhaps, is the church to be regarded as unoccupied.[80] Nevertheless, it has been intimated that insurance on a school house is forfeited if the building remains unoccupied during a customary vacation extending over a period of several months.[81]

[79] Quoted in the case last cited.

[80] Hampton v. Hartford Fire Ins. Co., 65 N. J. Law 265, 52 L. R. A. 344.

[81] Amer. Ins. Co. v. Foster, 92 Ill. 334, 34 Am. Rep. 134.

61. **Loss by fire—What is fire?**—According to a recent authority:[82] "No definition of fire can be found that does not include the idea of visible heat or light, and this is also the popular meaning given to the word. The slow decomposition of animal and vegetable matter in the air is caused by combustion. Combustion keeps up the animal heat of the body. It causes the wheat to heat in the bin and in the stack. It causes hay in the stack and in the mow of the barn to heat and decompose. It causes the sound tree of the forest, when thrown to the ground, in the course of years to decay and molder away until it becomes again a part of mother earth. Still, we never speak of these processes as fire. And why? Because the process of oxidation is so slow that it does not, in the language of the witness at the trial, 'produce a flame or glow.'"

Accordingly, it was held that there could be no recovery of fire insurance where wool in fleece was submerged in a flood and thereby suffered from spontaneous combustion, with smoke and great heat, but without a visible flame or glow. But with all deference to this decision, we must admit that a flash is sufficient, without flame or glow, unless we may regard the instantaneous glow of the flash as sufficient glow for the purpose of recovery. For example an explosion of gunpowder is sufficient to make the insurer liable unless the policy excepts loss by explosion.[83]

62. **Same subject—Hostile and friendly fires.**—To

[82] Western Woolen Mill Co. v. Northern Assur. Co., 139 Fed. 637.
[83] Scripture v. Lowell Mut. Fire Ins. Co., 10 Cush. 356 (Mass.).

make the fire insurance company liable, there must be not only a fire but a fire which was not intended to exist. A fire which is brought into existence, purposely, by the person in control of the premises, is called a friendly fire; for example, a fire in a stove, the slow burning of a cigar in smoking, or the flame of a lamp. Fires which are not friendly and for which the insurance company is liable are called hostile fires.

This distinction is best illustrated by a leading case on the subject.[84] The plaintiff operated a tobacco factory. His foreman emptied into a stove in one of the rooms the contents of a waste basket, intending to have the contents consumed. He subsequently closed the drafts of the stove, locked up the room and left. An hour afterwards, the chimney was discovered to be on fire, and when the door was opened the rooms were found to be filled with a dense smoke, which caused the damage for which this action was brought. An examination of the chimney showed that the soot in it had become ignited, and the heat had caused accumulated soot and particles of mortar to fall down and choke the flue which threw the smoke into the rooms. The insured was allowed to recover on the theory that, although a fire in a stove may be a friendly fire, a fire in the chimney is a hostile one.

The fact that a fire is where it was not intended to be makes it a hostile fire. If it is where it was intended to be, it is a friendly fire even though greater than was desired. For example, if the wick

[84] Way v. Abington Mut. Fire Ins. Co., 166 Mass. 67, 32 L. R. A. 608.

of a coal-oil stove is turned up too high and, as a consequence, is caused to smoke, or if a stove becomes too hot and blisters the woodwork, there can be no recovery. If, however, the stove is so hot that it causes the woodwork to take fire, there may be a recovery. In other words, a friendly fire is frequently the cause of a hostile fire for which the insurer is liable.

63. **Same subject—Consequential injury.**—Frequently, the firemen, acting as men of extraordinary prudence, destroy a thousand dollars' worth of property with water, in putting out a fire which has not burned five cents' worth of property. In such a case, to hold the insurance company liable for but five cents would be a virtual denial of protection from loss caused by fire. The New York standard policy allows a recovery of "all direct loss or damage caused by fire."

This brings us to the question of consequential damages. The rule in Hadley v. Baxendale, well known to students of the law of damages, restricts the plaintiff in an action for breach of contract to such damages as usually arise, or such as may be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Must the damages have been in the contemplation of the parties in order that they may be recovered in an action on a fire insurance policy? It is well settled that all the insured must show is that the fire caused the loss; the element of contemplation cuts no figure. This is true for the reason that the insurer has agreed to

make good all loss caused by fire. No doubt, in most branches of the law, the defendant may agree to be answerable for greater consequential damages than Hadley v. Baxendale allows. Two of the leading cases on the subject will serve as illustrations.

In Lynn v. Meriden,[85] there was a fire in a wire tower. The fire caused a short circuit, which increased the work of the dynamos. This, in turn, put a strain on certain pulleys, causing one of them to break. Then, this deranged the other machinery, knocked off one ball of the engine and so on, until, finally, a serious wreck occurred, though the fire was confined to the wire tower and but slight damage resulted from actual combustion. However, the court determined that the small fire was the proximate cause of the entire loss and allowed recovery for the wrecking of the plant.

In the Ermentraut case,[86] the policy expressly provided that if the building fell, except as a result of fire, the insurance should cease immediately. The building adjoining the one insured caught fire and, as a result, fell and carried down with it part of the building insured. Though no part of the plaintiff's building was consumed by fire, he was allowed to recover his fire insurance on the ground that his calamity was a direct loss or damage occasioned by fire.

A Pennsylvania court, however, denied recovery for an injury to an insured building, caused by a fire

[85] Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 20 L. R. A. 297.

[86] Ermentraut v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 30 L. R. A. 346.

engine, on its way to a fire, in being thrown from its course and colliding with the insured building.[87]

It has been decided, repeatedly, that loss caused by water or other fluids used in extinguishing a hostile fire is a direct loss by fire for which compensation must be made by the insurance company. The insured is also entitled to recover for loss by theft when goods are stolen in the turmoil caused by the fire, unless loss by theft is excepted in the policy.

64. **Loss expressly excepted.**—The New York standard policy provides that the insurance company shall not be liable "for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind or lightning." The important terms in this clause will be discussed in the order in which they appear.

65. **Same subject—Loss by war or riot.**—Provisions against loss by invasion and kindred forms of violence became important in the days of our civil war, though their insertion in policies dates back about two centuries. It is said that an invasion necessarily involves organization and military power or force.[88] The word "insurrection" in a case not involving fire insurance was given a very comprehen-

[87] Foster v. Fidelity Fire Ins. Co., 24 Pa. Super. Ct. 585.
[88] Boon v. Aetna Ins. Co., 40 Conn. 575, 585.

sive meaning a few years ago.[89] It was held to include obstruction of the mails by strikers, in opposition to the laws of the United States, and in defiance of such laws, even though no blood was shed.

A riot, it has been held, existed when a party of men, at night, fired shots and drove away the watchman from the premises insured, without proof of a previous unlawful assembly accompanied by force or violence.[90]

Lord Mansfield's statement in reference to military or usurped power is frequently quoted. He declared that this "meant rebellion conducted by authority, as in the year 1745 when the rebels came to Derby, and if they had ordered any part of the town or a single house to be set on fire, that would have been by authority of a rebellion. It must be by rebellion got to such a head as to be under some authority. Usurped power takes in rebellion acting under usurped authority."[91]

If the military power sets fire to building A, and the fire then spreads from one building to another until, finally, building D is destroyed, it has been held that the proximate cause of the destruction is military power and recovery must be denied.[92]

66. **Same subject—Loss by order of civil authority.**—Three of the leading cases on loss by order of civil authority will serve to define this term. In the first of these,[93] the policy apparently exempted the

[89] In re Charge to Grand Jury, 62 Fed. 828 (1894).
[90] Lycoming Fire Ins. Co. v. Schwenk, 95 Pa. St. 89.
[91] Langdale v. Mason, 1 Bennett's Fire Ins. Cas. 16.
[92] Aetna Ins. Co. v. Boon, 95 U. S. 117.
[93] City Fire Ins. Co. v. Corlies, 21 Wend. 367 (N. Y.), 34 Am. Dec. 258.

insurance company from loss by usurped power, but not from loss by order of civil authority or by explosion. The mayor of the city ordered a building, containing the merchandise insured, blown up with powder to prevent the spread of a conflagration. The court held that even though the mayor acted illegally, there was no element of usurped power, since he acted under color of office. Furthermore, the insurance company was held liable on the ground that the fire was the proximate cause of the loss. It is a matter of regret that the mayor did not order the building torn down instead of blasted with powder, because, as we have seen, an explosion is held to be one form of fire. Hence, it may be said in this particular case that fire was used to prevent the spread of fire. Which fire did the court regard as the cause of the loss?

The answer to this question is of less consequence in view of the Greenwald case, in which, notwithstanding the fact that the policy expressly provided that the insurer should not be liable for a loss from explosion, the insurance company was held liable for the destruction of the building by explosion intentionally brought about to stay a fire which was consuming the building.[94]

By analogy, it may be held that, where the building is sure to be destroyed by fire unless destroyed by civil authority, this is a case in which the proximate cause is not the order of the civil authority, but the fire itself. Destruction by civil authority may, with considerable justice, be confined to the

[94] Greenwald v. Ins. Co., 7 Am. Law Rep. O. S. 282 (Pa.).

class of cases which will be considered in the next paragraph.

Let us assume that the civil authorities set fire to a building, not to prevent a destruction by fire, but because it is an unsanitary tenement house and, by destroying it, seek to cremate germs and thus to prevent the spread of disease. A case similar to this arose in California.[95] To check a plague of grasshoppers, county supervisors started a fire in a pasture three or four miles from the plaintiff's property. The fire got beyond the control of the authorities and burned the plaintiff's grain. The insurance company was held not liable, on the ground that the loss of plaintiff's grain was occasioned by order of civil authority.

This case differs from our hypothetical case in that the tenement house, in the case assumed, was destroyed intentionally, the grain unintentionally. However, if the insurer is excused in case of unintentional loss, a fortiori should it be excused in case of willful destruction.

67. **Same subject—Loss by theft.**—We have seen that loss by theft may be regarded as a consequence of fire and included as a direct loss by fire.[96] To avoid liability on this ground, some policies expressly except this class of losses.

It has been held that such a clause does not exempt the insurer from liability for theft occurring during the necessary removal of the property and that, to cover such a loss, the policy should except theft

[95] Conner v. Manchester Assur. Co., 130 Fed. 743.

[96] § 63, supra.

"during or subsequent to the fire."[97] The authorities are in conflict.

68. **Same subject—Loss by neglect of the insured.**—The provision noted in § 64, exempting the insurer from liability when the loss is attributed to the negligence of the insured at and after the fire, appears to have no reference to negligence of the insured if prior to the fire, even though such negligence causes the loss. It is well settled that negligence prior to the fire is no defense of which the insurer may take advantage, and that it is, in fact, one of the most important risks insured against.

69. **Same subject—Loss by explosion.**—Loss by explosion[98] is a term which may be applied to a variety of combinations of circumstances. A fire may cause an explosion, or vice versa. The fire may be either friendly or hostile. The fire or the explosion may occur in an adjoining building and cause fire, or explosion, or damage without fire or explosion, in the building insured. Without attempting to dispose of all of these situations, certain principles which are fairly well settled may be noted.

What is an explosion? A mixture of whisky vapor and atmosphere came in contact with the flame of a gas jet, from which it ignited and, according to the court, exploded in such a manner as to constitute an explosion which prevented a recovery on a fire insurance policy.[99] An explosion, said the court, may be described generally as a sudden and rapid combustion, causing violent expansion of the air, and accom-

[97] Leiber v. Liverpool, etc., Ins. Co., 6 Bush 639 (Ky.), 99 Am. Dec. 695.
[98] See the full clause in § 64.
[99] United, etc., Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735.

panied by a report. Its existence cannot be settled by any fixed standard.

Fire causing explosion. If a hostile fire in the building insured causes an explosion therein, the fire insurance company may be held liable for the entire loss which results.[1] In this case loss is caused by fire, not by explosion.

However, if a friendly fire causes an explosion, the explosion and not the fire is deemed to be the proximate cause of the loss. For example, where a lighted match, held by an employee of the plaintiff, caused gasoline vapor to ignite and explode, the insurer was held not liable for the ensuing loss.[2]

Though not without a dissenting opinion, the New York Court of Appeals has held that, if a hostile fire in an adjoining building causes therein an explosion which destroys the plaintiff's building, the plaintiff cannot recover under a policy which provides that the insurer shall not be liable for loss caused, directly or indirectly, by explosion of any kind.[3] The United States Supreme Court apparently sanctions this doctrine. However, it has been suggested that this rule would have worked untold hardship if the great Chicago fire had been caused, not as tradition tells us, by a cow kicking over a lantern, but by a similar disturbance of a small can of nitroglycerine.

70. **Same subject—Loss by lightning.**—Certain policies make the insurer liable, expressly, for damage caused by lightning. The New York standard

[1] Washburn v. Miami Valley Ins. Co., 2 Fed. 633.
[2] Mitchell v. Potomac Ins. Co., 183 U. S. 42.
[3] Hustace v. Phenix Ins. Co., 175 N. Y. 292, 62 L. R. A. 651.

form of fire insurance policy, however, expressly excludes such liability.

At one time, fire insurance policies covered loss by lightning, which was regarded as "fire from heaven." Today, however, if the policy says nothing at all about loss due to lightning, the fire insurance company is not liable for such losses "because, though caloric may generate electricity, or electricity caloric, yet caloric and electricity are distinct things in nature."[4]

It is not certain what rule would be adopted if lightning caused a fire.

71. **Same subject—Fall of building.**—If a considerable part of the building falls, the structure will very frequently take fire if there is fire in a stove or furnace. To escape this situation, the New York standard policy provides that, "if a building or any part thereof falls, except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease."

Let us assume that the fall is caused by a hostile fire, which causes an adjoining building to fall upon the insured building, which in turn collapses. The rule appears to be that recovery will be allowed,[5] unless a considerable period of time, for example, an interval of twenty-five days, has elapsed between the fire and the collapse.[6]

72. **Cancellation.**—In reference to cancellation,

[4] Scripture v. Lowell Mut. Fire Ins. Co., 10 Cush. 356 (Mass.), 57 Am. Dec. 111.

[5] Ermentraut v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 30 L. R. A. 346.

[6] Cuesta v. Royal Ins. Co., 98 Ga. 720, 27 S. E. 172.

the New York standard policy provides as follows: "This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice, it shall retain only the pro rata premium."

The right of cancellation has given rise to much litigation. It is frequently the case that either the insured or the insurer desires to cancel the policy. On the one hand, the insured may become doubtful as to the solvency of his insurer, or he may desire to raise money by mortgaging his property to someone who will insist that the property be insured with a certain company with which he is not then insured, or the insured may sell his property and find that the easiest way to get rid of his insurance is to cancel his policy and permit the purchaser to obtain a new one.

On the other hand, the insurer may feel that the decreased water supply of the town in which the property is situated is insufficient to justify the low rate in the policy, or information may come to light as to the bad character of the insured. The small amount returned in such cases bears but little resemblance to the surrender value of a life insurance policy. The latter sum frequently exceeds half of the total amount payable in case of death. Unless

the right to cancel is reserved in the policy, it does not exist.[7] But even though provision for cancellation is made, it probably does not prevent the parties, by mutual consent, from agreeing upon cancellation in some other mode than that which has been specified in the policy.[8]

When the right to cancel is provided for, the right is absolute. The adverse party cannot question the motives of the one who demands cancellation. However, if, by mistake, the cancellation is made after the loss occurs and in ignorance of the loss, the cancellation will be rescinded in equity.[9] Moreover, cancellation must be demanded in good faith. This is illustrated by an Illinois case, in which it was held that an insurer had no right to cancel a policy upon learning that a forest fire was approaching the property insured.[10]

Form and sufficiency of notice. It is not required that the notice of cancellation be reduced to writing. Notice over the telephone is sufficient.[11] The notice must be clear and unequivocal. A mere expression of a desire to cancel is insufficient. No cancellation of part only of the contract can be made. This is probably not a surprise to the student who has already been impressed with the rigid common law rules against splitting up a cause of action. Thus where the insurer had insured for $10,000 and gave notice of cancellation as to half of the insurance,

[7] Rothschild v. Amer. Cent. Ins. Co., 70 Mo. 41, 41 Am. Rep. 303.
[8] Boland v. Whitman, 33 Ind. 64.
[9] Duncan v. N. Y. Mut. Ins. Co., 18 N. Y. Supp. 863.
[10] Home Ins. Co. v. Heck, 65 Ill. 111.
[11] Manchester Fire Assur. Co. v. Ins. Co. of Ill., 91 Ill. App. 609.

the notice was held to be of no consequence.[12] A mere mailing of the notice is not sufficient.[13] It must be received.

Repayment. If the insurer gives notice of cancellation, when must the return of unearned premium be made? Must it be returned when the notice is given, or, as the policy provides, "on surrender of this policy"? Though there is a conflict of authority, it is interesting to note that the New York Court of Appeals, in a four to two decision, held that it is insufficient for the insurer to give notice that the unearned premium will be returned and then to hold the amount subject to the call of the insured, but that the premium must be returned as a condition of cancelling the policy.[14]

Though it may be difficult to defend this decision, in view of the express provision of the policy, it is well to bear in mind that many a person whose home is insured, is doing business on an extremely narrow margin of capital, and that he may not be able to get other insurance until the premium is actually in his hand. However, this is rather an argument in favor of a change by the legislature of the standard form, than a reason for the construction adopted in the Tisdell case.

Surrender of the policy. By the express provision in the policy, the insured apparently has no right to demand the return of unearned premium until he surrenders the policy. What will he do if he has lost it?

[12] Van Tassel v. Greenwich Ins. Co., 151 N. Y. 130, 45 N. E. 365.
[13] Crown Point Iron Co. v. Aetna Ins. Co., 127 N. Y. 608, 28 N. E. 653.
[14] Tisdell v. N. H. Fire Ins. Co., 155 N. Y. 163, 40 L. R. A. 765.

It must be noticed that the cancellation may be complete before the right to demand the return of unearned premium arises. No doubt the cancellation may be effective even though the return of unearned premium is not even demanded. This question would be of great importance if other insurance is obtained, subject to the condition that it shall be void, if the insured has insurance in force at the time the second is effected. If the policy is lost, unearned premium might be recovered in proceedings analogous to those which may be resorted to when a negotiable instrument or similar papers have disappeared. In all such cases, no doubt, the amount of premium which must be returned depends on the time of cancellation, not on the return of the policy.

73. **Measure of damages.**—In addition to the various principles already noted in reference to the limits of recovery against the insurer,[15] the following must be observed:

Though the appended rule doubtless applies in the absence of any express provision in the policy, the New York standard policy provides that the company "shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs."

The policy then provides for an estimate of loss by appraisers. The nature and effect of provisions in regard to appraisement is a subject of considerable intricacy. All that can be given here is a key to the problem. If the appraisal is provided for merely to ascertain the amount of the loss, or is made a condi-

[15] Sec. 63.

tion precedent to any liability on the part of the insurer, it is valid and enforcible. If, however, it is agreed that the appraisers are to determine whether or not the insurer is liable, it is unenforcible, because it is an attempt to oust the jurisdiction of the court. In the absence of a valued policy law, to be noted hereafter, the policy fixes the maximum but not the minimum recovery against the insurer. In theory, the insurer may show that the property was worthless when the fire occurred and thus entirely escape liability, though the insured cannot recover more than the amount stated in the policy.

In order to discourage insurance companies from contesting the rights of insured persons too frequently, certain state legislatures allow the insured, if a successful litigant, to recover his attorney's fees and a percentage of the amount of the policy in addition to the full amount of the policy.[16]

74. **Same subject—Option to rebuild.**—The New York standard policy provides that it shall be optional with the insurer "to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind or quality within a reasonable time on giving notice, within thirty days after the receipt of the proof, herein required, of its intention so to do."

The essential purpose of this provision must be explained. No doubt, it has frequently happened that appraisers have estimated a loss at a figure so high as to be out of all proportion to the value of the

[16] Farmers' & Merchants' Ins. Co. v. Dobney, 189 U. S. 301, 47 L. Ed. 821.

property destroyed. In such a case, the insurer is helpless, unless a clause like the above is inserted. In many cases, the insured is much more anxious to get cash than he is to rebuild. Hence, such an option as this, which, it must be noticed, is given not to the insured, but to the insurer, serves as a check upon extravagant claims against insurers, who might otherwise be powerless to defend themselves from virtual extortion.

An election to rebuild, if it is properly exercised by giving notice to this effect to the insured, is irrevocable and supersedes all rights under the policy. The insured must then sue, not for the failure to pay under the policy, but for breach of contract in failing to rebuild.[17] Furthermore, the insured may then recover more than the amount of the policy, the measure of damages being based on the cost of rebuilding, regardless of the amount of the insurance.[18]

A further provision prevents abandonment by the insured. Abandonment will be considered in a subsequent chapter on marine insurance.

75. **Same subject—Valued policy laws.**—In many states, statutes known as valued policy laws have been enacted. For example, in Missouri, it has been provided that in all suits upon policies of insurance against loss or damage by fire, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said prop-

[17] Hartford Fire Ins. Co. v. Peebles' Hotel Co., 27 C. C. A. 223, 82 Fed. 546.

[18] Same case.

erty; and in case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured, the property may have sustained, between the time of issuing the policy and the time of the loss. Such laws, by express provision, generally supersede any agreement of the parties and have been held valid.[19] It must be noted that the full amount of the policy is recoverable only in case of total loss.

As to the advisability of such legislation, much has been said on both sides. On the one hand, it is contended that (1) the fire destroys the best evidence of the value, making it impossible for the insured to prove his case; (2) it is unjust for the insurer to collect excessive premium in perhaps a thousand cases and resist liability in the one case in which it is called on to pay; (3) the insurer may fully protect itself by inspecting the property at the time the insurance is issued and cut down the amount if more is applied for than should be issued. On the other hand, it is urged that (1) the destruction of the evidence may injure the insurer as well as the insured; (2) in many cases, for example, where there is want of insurable interest, the mere receipt of premium does not make the insurer liable, because the agreement is tainted with illegality; (3) the low insurance premiums of today would have to be raised to meet the cost of inspection, if examination of the property must be made in every case in advance of insurance;

[19] Orient Ins. Co. v. Daggs, 172 U. S. 557.

(4) there is too much arson already. Such laws increase it.

Total loss. What constitutes a total loss? It is difficult to conceive of the destruction of every single particle of any building by a fire. Though much conflict of authority appears on this question, the following statement of the Minnesota Supreme Court appears very satisfactory: A building is not a total loss unless it has been so far destroyed by the fire that no substantial part or portion of it above the foundation remains in place capable of being safely utilized in restoring the building to the condition in which it was before the fire. The words "total loss," when applied to a building, mean totally destroyed as a building; that is, that the walls, although some portion of them remain standing, are unsafe to use for the purpose of rebuilding, and would have to be torn down, and a new building erected throughout. There can be no total loss of a building so long as the remnant of the structure left standing above the foundation is reasonably and safely adapted for use (without being taken down) as a basis upon which to restore the building to the condition in which it was immediately before the fire; and whether it is so adapted depends upon the question whether a reasonably prudent owner of a building uninsured, desiring such a structure as the one in question was before the fire, would, in proceeding to restore the building, utilize such standing remnant as a basis. If he would, then the loss is not total.[20]

[20] Northwestern Mut. L. Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48, 88 N. W. 265.

Even though material of value is left after the fire, if the expense of removing the worthless fragments of the old building would at least equal the value of all the materials left after the fire, it has been held that a total loss exists.[21]

76. **Notice and proofs of loss.**—The New York standard policy makes provision for notice and proofs of loss to be furnished by the insured after the fire occurs. As to notice, it is provided that, "If fire occur the insured shall give immediate notice of any loss thereby in writing to this company." As to proofs of loss, it is provided that the insured "within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company signed and sworn to by said insured, stating" certain matters specified in regard to the loss, and furthermore, it is provided that the loss shall not become payable until "satisfactory proof of the loss" has been received by the insurer. Notice and proofs of loss must not be confused. The former is informal and must be given, at once, after the fire occurs. The latter is a formal document, for the preparation of which two months are allowed.

Immediate notice. What amounts to immediate notice is purely a matter of circumstances. A period of eleven days has been considered too long a time under certain conditions,[22] notice fifty-three days after the fire has been held immediate notice where the policy was lost when the fire occurred.[23] However, various family ills of the insured were held

[21] Harriman v. Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

[22] Solomon v. Continental, etc., Ins. Co., 160 N. Y. 595, 46 L. R. A. 682.

[23] Trask v. State, etc., Ins. Co., 29 Pa. 198, 72 Am. Dec. 622.

insufficient to excuse a delay of over sixty days, when interrupted by periods of abundant opportunity to give notice.[24]

Proofs within sixty days. In regard to the furnishing of proofs of loss, the policy expressly provides the exact time within which they must be furnished. Furthermore, it is provided in the New York standard policy that the loss shall not become payable until satisfactory proofs have been furnished.

If, for the best of reasons, sixty-one days elapse before proofs of loss are furnished, shall this provision be regarded as in the nature of a penalty and hence unenforcible, or as a condition precedent to the existence of any right against the insurance company? Though the provisions in the policies vary considerably and are, of course, of vital importance in determining the answer to this question, it is interesting to note that the insured has been excused for a delay of seven years notwithstanding a requirement of proofs in sixty days.[25] At the other extreme, where a railroad was insured against liability for fire caused by its engines, it was held necessary to furnish proofs within sixty days after the fire, even though the insured did not know it was liable until after the sixty days had expired.[26]

A conflict of authority exists as to the necessity of receiving the proofs of loss within the prescribed time if duly mailed within the sixty-day period. By the weight of authority, it appears impossible for the insurer to draw up the policy in such a way that an

[24] Parker v. Farmers' Fire Ins. Co., 179 Mass. 528, 61 N. E. 215.

[25] Kirk v. Ohio Valley Ins. Co., 8 Ohio Dec. 182; 6 Wkly. Law Bul. 200.

[26] Eastern R. Co. v. Relief Fire Ins. Co., 98 Mass. 420.

absolute forfeiture results from failure to furnish proofs of loss within the sixty-day period, regardless of excuse for delay. Such a rule may be defended on the grounds that public policy forbids the enforcement of a penalty and that certain vested rights accrue to the insured when the fire occurs.

Satisfactory proofs. It is required that "satisfactory proofs" be furnished. Satisfactory proofs, as defined by the authorities, are proofs with which the insurer should be satisfied, and if they comply with the requirements in the policy they will generally answer the purpose.[27] And moreover, it is a very easy matter for the insurer to waive his right to object to proofs of loss by failure to reject them within a reasonable time after he has received them.

Effect of statements in the proofs. The statements contained in the proofs of loss are not evidence against the insurer for obvious reasons, nor are they conclusive evidence against the insured. The insured may show that he made such statements through mistake. However, such a statement may be strong evidence against the insured, because it may be in the nature of an admission against interest, or it may mislead the insurer and thus estop the insured.

77. **Other requirements subsequent to loss.**—The New York standard policy makes it compulsory for the insured, if required, but not otherwise (1) to furnish verified plans and specifications of any buildings, fixtures, or machinery destroyed or injured; (2) to furnish the certified statement of the magis-

[27] Flynn v. Mass. Ben. Assn., 152 Mass. 288, 25 N. E. 716.

trate or notary, living nearest the place of fire and disinterested and unrelated to the insured, as to the honesty of the claim of the insured; (3) to exhibit to a designated employee of the insurer the property insured; (4) to submit to examinations under oath by any designated employee of the insurer; (5) to produce his books and papers for examination and to allow copies to be made therefrom. Such requirements have been liberally construed with a view to the protection of the insured.

The clause which appears to cause the greatest amount of effort on the part of the insured is that requiring him, on request, to furnish a magistrate's certificate. One court has held such a provision void, because it is not reasonable to require the insured to furnish such a certificate in view of the fact that the insured cannot compel the magistrate to act in the matter.[28] Moreover, the courts are unwilling to determine, by exact measurement, if the magistrate who furnished the certificate was in fact a few inches farther removed from the property destroyed than any other official of the same dignity.[29] Furthermore, it has been held that the certificate of the next nearest magistrate is sufficient, if the nearest refuses to act.[30]

78. **Time within which action must be commenced.**—The New York standard policy provides that "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the

[28] German-Amer. Ins. Co. v. Norris, 100 Ky. 29, 37 S. W. 267.
[29] Williams v. Queen's Ins. Co., 39 Fed. 167.
[30] Noone v. Transatlantic Ins. Co., 88 Cal. 152, 26 Pac. 103.

insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Validity. This provision is generally held to be valid, though in one state it has been held contrary to public policy and therefore void.[31] Probably in all states, if the conduct of the insurer in a particular case renders it unreasonable, it will not be enforced,[32] or, at least, in such a case, the time for bringing suit will be regarded as having been extended.[33] On the other hand, such a provision as this has been held binding even against an infant who has effected insurance, so that he cannot wait to bring suit within twelve months after his majority.[34] However, it must be observed that it is provided by statute, in certain states, that any agreement upon a different time for the commencement of actions from the time provided in the general Statute of Limitations shall be null and void as to such agreement.[35] Such a provision does not except insurance contracts but was unquestionably designed to include them.

When time commences to run. We have seen that it is expressly provided that the action must be commenced within twelve months after the fire, not after the appraisal is completed, or the amount of damage ascertained. But the policy requires the insured to do many things after the fire, such as the preparation and forwarding of proofs of loss. Nevertheless, it is

[31] Miller v. Ins. Co., 54 Neb. 121, 74 N. W. 416.
[32] Fullam v. N. Y. Union Ins. Co., 7 Gray 61 (Mass.), 66 Am. Dec. 462.
[33] Fritz v. Brit. Am. Assur. Co., 208 Pa. St. 268, 57 Atl. 573.
[34] Mead v. Phoenix Ins. Co., 68 Kan. 432, 64 L. R. A. 79.
[35] Rev. St. Kansas, 1909, Sec. 5610.

generally held that delay due to the absorption of the time of the insured in looking after such details does not prevent the time from commencing to run as soon as the fire is extinguished. It must be noted that many policies, particularly in former days, required the action to be brought within twelve months next after the loss. A distinction between fire and loss has been made. Loss, it is held, does not occur until the proof of loss has been duly filed and the right of action against the insurer is complete. Accordingly, the insured is allowed a considerably longer time by this holding.[36] Many courts have shown an inclination to revert to this rule even though the policy speaks of twelve months after the *fire* and not after the *loss*.[37] Such decisions, though doing violence to the language of the policy, are frequently based on elements of waiver or estoppel against the insurer and might be defended, particularly where the period provided is very short, on the ground of the repugnancy of such a provision to the purpose of the contract.

[36] Steen v. Niagara Fire Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297.
[37] Sample v. Ins. Co., 46 S. C. 491, 47 L. R. A. 696.

CHAPTER X.

LIFE INSURANCE.

79. **The life insurance business—The old line company.**—Two classes of life insurance organizations are known in the United States, old line companies and mutual benefit associations. What is familiarly known as an old line life insurance company may be described as one in which there are no social features and nothing, in fact, but the elements of a strictly commercial concern. The term "old line" is used to designate it as the conservative organization sticking to the methods of business in vogue before the rise to importance of the mutual benefit association. For many purposes, it is only the old line company which is regarded as being, in a strict sense, a life insurance company.

Three forms of organization are familiar in old line insurance circles: stock, mutual and mixed companies. A stock company, created for the purpose of doing a life insurance business, differs in its organization in no essential detail from the ordinary private corporation. The corporation issues capital stock to shareholders who control the affairs of the company, the policyholders being little more than creditors of the corporation. The mutual company is a popular form of organization in the United States. The company possesses no capital stock and hence has no stockholders. The policyholders alone

act as stockholders. They receive all the dividends and elect the directors. All who insure in the mutual companies thereby become members of the organization. The student must not confuse mutual life insurance companies with mutual benefit associations. All mutual benefit associations are mutual companies, in so far as their control is concerned, but all mutual companies are not mutual benefit associations. For example, the New York Life Insurance Company is a mutual company, but not a mutual benefit association. The third form of organization is the mixed company, which partakes of the features of both stock and mutual companies. There is a limited number of stockholders who are not in exclusive control, but, in many cases, share the right of election of officers with the policyholders.

80. **Same subject—The mutual benefit association.**—The mutual benefit association has assumed many forms in this country, from the perfectly organized corporation of immense financial proportions to the society of but a handful of employees in a particular business establishment. One of the most prominent characteristics of these organizations, though not an inseparable one, is the payment of losses by assessments, not by premiums as in the old line companies. Hence, the mutual benefit association is frequently called an assessment company. Assessments are levied to meet losses after they occur. If no one dies for ten years, no one is assessed during that time. On the other hand, premiums are fixed in amount and are payable whether or not any of the members have died since the company was or-

ganized. Mutual benefit associations are frequently referred to as fraternal insurance associations, though a distinction may be drawn between the two and, for the sake of clearness, we may also compare them with mutual life insurance companies: (1) Mutual life insurance companies have as members only policyholders, but collect premiums, not assessments. (2) Mutual benefit associations, though controlled solely by their members, collect assessments, not premiums. (3) Fraternal insurance companies possess the characteristics just stated in regard to mutual benefit associations, but have many social features attached, particularly the usual accompaniments of the lodge system with secret rituals and ceremonials.

The distinction between the mutual benefit and old line company is of great importance, owing to the fact that stringent rules and regulations exist in reference to the conduct of the life insurance business. Many mutual benefit associations have succeeded in convincing the courts and legislatures that they are not life insurance companies at all, and hence need not comply with the aforesaid regulations. The result has been that many of these societies have escaped regulation almost entirely, or have been confronted with a separate group of statutes designed to control their management.

Starting with this distinction between the old line and mutual benefit company, certain differences in terminology, frequently in use, must be noted. The insured in the old line company is a policyholder, in the mutual benefit association a member. The pol-

icyholder receives a policy, the member a certificate of membership. To protect one's policy from forfeiture, one must pay premiums; to prevent loss of membership, one must pay assessments. The head of the old line company is known as President; the head of a fraternal order is the Worthy Commander, or, perhaps, the Supreme Potentate, or Matchless Dictator. It has been suggested, not unwittily, that the legal powers of the head of a fraternal order over its members must not be determined by the title of his office. On the death of the insured in an old line company, the beneficiary receives the insurance; on the death of a member of a fraternal order, the beneficiary or those dependent on the member receive death benefits.

81. **Payment of premiums.**—A life insurance contract is generally regarded as unilateral. The insurer promises to pay the insurance on the death of the insured, if the insured will pay the premiums as they fall due. The insured does not agree to pay anything, at least nothing beyond the first premium, although persons insured, who have given their notes in payment of premiums, have been held liable in many cases, in actions on such notes. Moreover, it has happened frequently that an insurance agent has advanced a premium and is compelled to sue to get his money back. Clearly, such actions are not maintainable because of any provision in the policy, but by virtue of subsequent or collateral agreements.

Most of the thousand and one decisions in regard to the payment of insurance premiums are in exact accord with the general rules governing payment,

as to the time when payment must be made if the day of payment falls on a legal holiday. One peculiar situation of great importance has arisen: X's quarterly premium falls due on October 29, and amounts to eleven dollars and seventy cents. At the time, there is on hand in the office of the company a dividend due to B on the same policy, amounting to twelve dollars. Must the insurer automatically transfer dividends to the payment of premiums and thus avoid a forfeiture, even though X has given them no direction to do so, and although the insurer has not agreed to make the transfer without a request from X? Most of the reported cases are based on the ground of waiver or agreement and hence do not enable us to determine the answer to this question. There is an intimation in an Illinois decision that the retention of the dividend must be regarded as payment on the premium.[38] Hence, it would seem that these reciprocal claims compensate each other.

82. **Payment of assessments.**—What penalty can be imposed for failure to pay assessments to a mutual benefit association? Clearly, the member may be expelled. But can he be compelled to pay in an action at law? A conflict of authority confronts us here. Since the theory on which assessments are based is that they go to pay for protection already received, the same court might hold, consistently, that assessments, though not premiums, may be recovered in legal proceedings.

Change of assessments. Much bitterness has ever arisen over attempts on the part of mutual benefit

[38] Chicago Life Ins. Co. v. Warner, 80 Ill. 410.

associations to raise their assessments. It is well settled that the member on entering the association may be required to submit to future amendments of the by-laws in reference to assessments, including those raising rates. But suppose that he makes no such agreement? In many cases, it has been held that, unless the member agrees to be bound by future by-laws, he cannot be forced to pay a higher rate by such a change.[39]

83. **Effect of nonpayment.**—In the absence of any provision in the policy to the contrary, failure to pay insurance premiums, when due, works a forfeiture of all rights of the policyholder. However, one of the most commendable features of modern life insurance is the provision now made for reinstatement of the insured within a certain time upon paying a lapsed premium,[40] or, much more frequently, for a cash surrender value, a cash loan value, paid-up insurance or extended insurance after the payment of the first two or three premiums. These terms may be illustrated by the provisions of a policy actually issued to a person thirty-five years of age, in the amount of $10,000, by an eastern company. The insured was required to pay each year until his death, $281.10, as premium, to the insurer. The insurer agreed, in addition to paying the annual dividends, to grant the insured the following options: (1) To borrow from the company $320 at the end of three years, up to $4,250 at the end of twenty-five years, with interest at five per cent. This is the

[39] Covenant Mut. Life Assoc. v. Kentner, 188 Ill. 431, 58 N. E. 966.
[40] Lovick v. Provident Life Assn., 110 N. C. 93, 14 S. E. 506.

cash loan value. (2) The same amounts, respectively, were to be paid on the surrender of the policy. This is the cash surrender value. (3) The insured might surrender his policy at the end of three years and receive, in return, insurance in the amount of $720 or at the end of twenty-five years insurance in the sum of $6,380. This is called paid-up insurance. It must be noted that while the insured would thus escape all liability for future payments, this sum does not become due until the death of the insured. In other words, the time for the payment of the insurance remains, but the amount is decreased. (4) In place of paid-up insurance, the insured, at the end of three years, may have the original amount, $10,000, extended for three years and seven months, or for fourteen years and eleven months, at the end of twenty-five years. This is called extended insurance. Thus, it will be seen that extended insurance differs from paid-up insurance in being a reduction in time, but not in amount.

Extended insurance remains the same in amount as the original policy, though the time is cut down. There appears to be no good reason for calling the one extended and the other paid-up. Both, in a sense, comply with both appellations. However, the terms have become fixed. Owing to the fact that the insured must exercise his option within a certain time after his last premium falls due, difficulty has arisen where he fails both to pay and to exercise his option, and leaves the company at sea as to which one of his privileges he desires to exercise.

In nearly every state it is settled that time is of

the essence of such an agreement and that if the insured fails to exercise his option within the time prescribed, all of his rights become forfeited. However, time is not of the essence of such a contract in Kentucky, according to precedent.[41] In the Kentucky decision, the attorney for the insurance company failed, in his argument, to fire his best gun, or at least, made use of his weakest. It was argued that the delay in making the demand imposed upon the insurer the burden of unnecessary bookkeeping, and that forfeiture was therefore proper. The court retorted with a quotation from an earlier Kentucky case, as follows: "The premiums, by express convention, paid for both current insurance and a paid-up policy, and now to deny to the assured the benefit of a paid-up policy because the old one was not surrendered in time is, in the strictest and most obnoxious sense, a forfeiture. Such a claim is without support in reason, justice, or authority, and cannot be sanctioned in a court of equity."

A much better reason for holding contrary to the Kentucky court is based on the fact that, by holding off for several months after the policy becomes forfeited, the insured is enabled to play fast and loose, by demanding extended insurance if, in the meantime, his health fails, or paid-up insurance if he sees, later, that he will probably live beyond the period of extension. Such a principle, carried to a logical extreme, would bankrupt many insurance companies. To use a popular expression, the insured is allowed to bet on a sure thing, under the Kentucky rule.

[41] Manhattan Life Ins. Co. v. Patterson, 109 Ky. 624, 53 L. R. A. 378.

84. **Excuses for non-payment.**—The sickness, insanity, or death of the insured is no excuse for his failure to pay his life insurance premiums. The only excuses recognized are those arising by operation of law, or by the act of the insurer. Among the latter excuses are the insolvency of the insurance company, resulting in a suspension of payment, waiver and estoppel. Among excuses arising by operation of law, the most perplexing is war between the country of which the insurer is a resident and that of the insured. For example, many persons residing in Georgia were insured in New York companies at the outbreak of the Civil War. War suspends and makes illegal commercial intercourse between the citizens of the belligerents, whether such persons are combatants or non-combatants. Furthermore, our Civil War was, for this purpose, as much a war between independent nations as the Russo-Japanese war. After the close of the Civil War, much litigation arose and three lines of authorities developed.

(1) Under the Connecticut rule, the contract terminated absolutely with the outbreak of the war and was not, for any purpose, revived by the cessation of hostilities. One of the grounds upon which this rule is based is, that the premium could have been paid, lawfully, by a change of residence to a northern state or through a northern agent.[42] If the rule of international law laid down is correct, then this decision is unquestionably sound. If, however, the court went wrong in its conception of international

[42] Worthington v. Charter Oak Life Ins. Co., 41 Conn. 472, 19 Am. Rep. 495.

law, this rule in insurance appears harsh, and results in a great and undeserved gain to life insurance companies. Those who hope that the commercial classes will eventually demand the abolition of war can hardly expect that the life insurance companies will be encouraged by such a rule to join them in making the demand.

(2) Under the New York rule, the contract revived at the close of the war upon the tender of overdue premiums.[43] Here again,[44] betting on a sure thing is countenanced. A Confederate veteran, half dead at the close of the war, could crawl to the office of the company and revive his policy. The one who escaped sound and whole would find it cheaper, in many cases, to take out new insurance. If the death of the insured occurred during the war, this rule allowed a recovery of the amount of the policy minus the premiums due.[45]

(3) The third rule, adopted by the United States Supreme Court, appears most just to all concerned. The policy is forfeited so that it cannot be revived, as under the New York rule. However, the insured is entitled to the equitable value of the policy, arising from the premiums actually paid. This equitable value is the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy, when the forfeiture occurred.[46] In other words, the insured receives a sum about equal to the reserve value of the policy,

[43] Cohen v. N. Y. Mut. Life Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522.
[44] See § 81.
[45] Martine v. Internat. Life Assur. Soc., 53 N. Y. 339, 13 Am. Rep. 529.
[46] N. Y. Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789.

the fund which was laid aside to meet this anticipated loss.

85. **Notice of premiums due.**—The following principles may be deduced from the endless litigation as to the duty of the insurance companies to notify the insured of the maturity of the premium. (1) In the absence of an agreement to do so, the insurer is not bound to give the insured notice of the fact that a premium is due, if the amount and time of payment are certain. (2) If the association is doing business on the assessment plan, notice is generally required to fix the liability of the insured. It may be regarded as implied in the contract. (3) The insurer may, by waiving its rights to receive payment without notice, or by its course of business, make such notice necessary. (4) By statute, it is provided in many states that notice must be given. Certain courts have held that the insured cannot waive his statutory right to receive notice, even by express agreement.[47] (5) Where the insurer agrees to deduct from the premium a sum equal to the amount of the dividends and allow the insured to tender only the balance, the insurer must give notice of the amount of such balance.[48] Here, notice is virtually implied from the agreement.

86. **Suicide.**—Let us assume that X takes out life insurance in favor of his own estate and that the policy makes no provision for death by suicide. If X commits suicide, can his personal representative recover the insurance? In the leading case on the

[47] Griffith v. N. Y. Life Insurance Co., 101 Cal. 627, 40 Am. St. Rep. 96.
[48] Phoenix Ins. Co. v. Doster, 106 U. S. 30.

subject, the Ritter case,[49] the United States Supreme Court denied recovery for two reasons: (1) It is not contemplated that payment should be made in such a case. (2) Even if the insurer agreed to pay in case of suicide, such an agreement would be contrary to public policy. Though, in the Ritter case, the insurance was payable to the personal representative of the insured, a later Federal decision extends the principle to insurance payable to a beneficiary other than the insured.

The rule in the Ritter case has been repudiated by the great weight of authority, particularly in cases in which a third person has been designated as beneficiary. However, it is generally agreed that the insurance cannot be recovered if the insured takes out insurance with the intention of committing suicide then present and proceeds to accomplish his purpose. The defense in such a case is based on fraud.[50]

87. **Suicide excepted.**—As soon as the life insurance companies realized the effect of the rule which prevails in the absence of a stipulation in reference to suicide, many of them inserted express provisions excusing the company from all liability in case of the death of the insured "by suicide," "by his own hand or act," "by self-destruction," or, if he "takes his own life." Though the courts declared such a provision to be perfectly valid, many of them rendered it almost worthless to the insurance companies by holding that suicide committed while the insured

[49] Ritter v. Mutual Life Insurance Co., 169 U. S. 139.
[50] Smith v. Society, 123 N. Y. 85, 9 L. R. A. 616.

was insane was not excepted under these phrases.[51] It was an easy task for the attorneys for the plaintiff, in an action to recover the insurance, to convince the jury that the insured was insane when he killed himself. Suicide is frequently the result of an unbalanced mind.

Furthermore, a liberal rule in favor of the insured was adopted by most of the American courts in determining that insanity existed. For example, where the plaintiff's husband took poison which caused his death, the United States Supreme Court held that there could be no recovery if the insured possessed his ordinary reasoning faculties when he killed himself, but that a recovery would be allowed if his reasoning faculties were so far impaired as to prevent ability to understand the moral nature of his act, even though he intended to kill himself, or if the suicide was the result of an insane and irresistible impulse.[52]

88. **Exception of suicide, sane or insane.**—Many insurance companies finally stipulated that they should not be liable in case of suicide, whether the insured was sane or insane when he killed himself. This provision was also held to be enforcible and left but one door open for the recovery of insurance in cases in which the insured might be regarded, in a popular sense, as having committed suicide. This avenue of escape lies in a strict construction of the term "suicide." What is suicide? If one, by mistake, drinks poison for coffee, and dies as a conse-

[51] Blackstone v. Standard Life & Acc. Ins. Co., 74 Mich. 592, 3 L. R. A. 486.

[52] Life Ins. Co. v. Terry, 15 Wall. 580 (U. S.).

quence, has he committed suicide? Or if he becomes a raving maniac and beats his brains out in the strong ward, has he committed suicide?

In one case, the insured was found dead, with a bullet through his brain. There seems to have been no dispute but that the fingers of the insured pulled the trigger that started the bullet on its journey. It was left to the jury to determine whether or not the insured had mind enough to know that, if he fired the pistol ball through his head, it would be likely to produce death.[53]

Though this decision appears to stretch to the utmost the rule allowing a recovery, the essential idea appears sound. Unless there was an intention to destroy one's life, popular usage of the word "suicide" would justify us in saying that suicide did not occur. Accordingly, many courts have held that there can be no suicide without a knowledge on the part of the insane person of the physical nature of his act. However, many decisions to the contrary have appeared. Apparently, for the purpose of extending the exemption of the insurance company to cases wherein the insane person is unconscious of the physical nature of the act of self-destruction, certain companies have inserted in their contracts the following clause: "If the member shall die by any means or act which, if used or done by such member while in possession of all natural faculties, would be deemed self-destruction," the certificate shall be void. Such a provision has been upheld.[54]

[53] Mutual Ben. Life Ins. Co. v. Daviess' Exrs., 87 Ky. 541, 9 S. W. 812.
[54] Cotter v. Royal Neighbors, 76 Minn. 518, 79 N. W. 542.

89. **Death at the hands of justice.**—If the insured suffers capital punishment, can the beneficiary recover the insurance? In such a situation the insurance company is not liable, if there is a clause excepting recovery in case of death at the hands of justice, or if no stipulation on the subject appears. Probably, it is against public policy for the insurer to agree, expressly, to pay in this case. Few cases on this point have arisen, because few people who are electrocuted or hanged through legal process have sufficient means or foresight to insure their lives. In the leading case on the question, it was contended before the United States Supreme Court that the insured was not guilty and should not have been convicted. The court declared that such an argument is without merit and that a miscarriage of justice is a risk which it would be against public policy for insurance companies to carry.[55]

90. **Death in violation of law.**—Certain life insurance policies contain a clause declaring the policy void in the event that the insured shall die "in known violation of any law of these states or of the United States, or of any other country which he may be permitted under this policy to visit or reside in." It is generally agreed that suicide is not included as death in violation of law. Though attempts to commit suicide, or suicide at common law may be regarded as criminal, they are not violations of law for this purpose.

It is generally agreed that the law violated must be a criminal law to excuse the insurer, though it is

[55] Burt v. Union Cent. Life Ins. Co., 187 U. S. 362.

difficult to see how the word "criminal" can be read into the plain provision of the policy. A Missouri court has gone farther and has intimated that the policy is not avoided unless the insured is in the act of committing a *felony*.[56] However, the decision is based on the rule of construction which requires a clause to be construed in the light of the company it keeps. Other exceptions closely associated with the one in question referred only to felonies. However, a later decision in Missouri denied recovery where the insured had committed a crime which was less than a felony, though the court intimated that every misdemeanor amounting to a breach of the peace will not be considered a violation of law which will avoid the policy.[57]

In innumerable cases, the insured has been killed while committing an assault, or while retreating from a fight. In the former case, recovery is generally denied, though not in the latter case, if the retreat was made with the intention of withdrawing from the combat.

Death not caused by violation. In one city in the United States, the home of a religious colony, it is said to be criminal to smoke on the street. Suppose that the insured while smoking as thus forbidden, walks across the street, falls accidentally into a manhole and is killed. Has he met death in violation of law? It is well settled that, for this purpose, he has not. For example, where the insured was killed while carrying a concealed weapon, the insurance

[56] Harper's Admr. v. Phoenix Ins. Co., 18 Mo. 109.
[57] Wolff v. Conn. Mut. Life Ins. Co., 5 Mo. App. 236.

may be recovered unless the death was the natural result of carrying the weapon.[58]

According to one line of authorities, the death must occur while the insured is in the very act of committing a crime. If the insured loots a cash drawer, starts to escape and is killed with the goods on him, before he reaches the outer door, he has not met death in violation of law, even though he was killed by a policeman. At least, such was the decision in Nebraska,[59] apparently on the theory that carrying away the loot is not a crime, and that the crime was a thing of the past.

The United States Supreme Court has handed down a decision which gives much less cause for congratulation to violators of the law. The insured was driving a race horse for money, in violation of law. A collision occurred. Then the insured jumped to the ground, and tried to stop his horse, but was killed in trying to get hold of the reins. Though racing for money may be illegal, stopping a race horse is not. However, recovery was denied on the ground that the illegal act and the death were but parts of the res gestae, forming one continuous transaction.[60]

[58] Jones v. U. S. Mut. Acc. Assn., 92 Iowa 652, 61 N. W. 485.
[59] Griffin v. Western Mutual Benevolent Assn., 20 Neb. 620, 31 N. W. 122.
[60] Insurance Co. v. Scaver, 19 Wall. 531 (U. S.).

CHAPTER XI.

MARINE INSURANCE.

91. **The marine insurance business.**—Though fire insurance covers but a single form of loss, destruction of property by fire, and life insurance becomes payable on the happening of but one event, death, it is otherwise in the case of marine insurance. If the "perils of the sea," fire, pirates or capture cause a loss of a vessel or her cargo, the owner is entitled to indemnity, if he has procured the customary form of marine insurance.

The most discouraging feature of American marine insurance is the fact that probably more than half of it is in the hands of foreign companies. Moreover, certain extensive ship owners, whose fortunes are not all in one bottom trusted, find that it is cheaper to lose a ship occasionally than to carry insurance on all of their vessels, and therefore carry no marine insurance.

92. **The risks assured.**—In the United States, each marine insurance company has its own form of policy. However, there is substantial uniformity. "Touching the adventures and perils which the said X Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of marque and countermarque reprisals,

takings at sea, arrests, restraints and detainments of all kings, princes or people of what nation, condition or quality soever, barratry of master and marines, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or any part thereof."

Thus the policy covers losses due to the perils of inanimate forces and the hostile acts of man. Ordinary wear and tear is not a peril of the sea, but an inevitable accompaniment of navigation and is therefore not covered by marine insurance.

Endless difficulty has arisen here, as in many other branches of the law, in determining what is the proximate cause of a given loss. It is agreed that the insurer is not liable unless the peril insured against is the procuring or efficient cause of the loss. For example, during our Civil War, Confederate troops put out the light on Cape Hatteras. This caused the captain of the vessel insured accidentally to wreck the ship. Part of the cargo was saved, part could have been saved but for the conduct of Confederate soldiers. The rest was lost with the ship. Though the cargo was insured "free from the consequences of hostilities," the insured was allowed to recover only for the part of the cargo lost with the ship. The proximate cause of the loss of this portion, the English court held, was the wrecking of the ship, not the putting out of the light.[61]

All other perils. The very comprehensive assumption of risk as to "all perils, losses and misfortunes"

[61] Ionides v. Univ. Mar. Ins. Co., 14 C. B. (N. S.) 259 (Eng.).

has been of much less assistance to persons insured than such language seems to indicate. Under the well-known rule of construction, *noscitur a sociis* (it is known from its associates), this phrase must be interpreted in the light of the perils enumerated[62] and therefore includes only risks similar to those expressly covered.

Further limitations upon the risks insured against are embraced within the doctrine of "implied warranties," a term peculiar to marine insurance.

93. **Implied warranties.**—It is customary to say that in all marine insurance contracts there are three implied warranties by the insured: (1) that the vessel is seaworthy, (2) that there shall be no deviation, and (3) that the vessel shall not, with the consent of the insured, embark in a venture tainted with illegality. Objection has been urged to the appellation "implied warranties," and it is contended that these are really conditions precedent to the attaching of the risk and should, therefore, be called "conditions," not warranties. Nevertheless the term "implied warranty" is fixed in marine insurance.

Seaworthiness. If a vessel be insured under a voyage policy, that is, for a given voyage, the insurer is not liable for any loss unless the vessel was seaworthy at the time she commenced her voyage. In England no such condition is implied in a time policy; that is, insurance for a definite period. In this country there is a conflict of authority on the question.[63]

Deviation. Any deviation avoids the policy even

[62] Compare § 90.

[63] Merchants' Ins. Co. v. Morrison, 62 Ill. 242, 14 Am. Rep. 93.

though the vessel is in no way injured by the act. A striking fact is this, that even though the vessel keeps in the straight and narrow path prescribed in the policy she is guilty of deviation if she makes unreasonably slow time.[64] On the other hand, she may depart from her path without deviating in this technical sense if forced to do so by stress of weather or circumstances, for example, danger of capture.

Illegality. But one extraordinary ruling in regard to illegal ventures is worthy of mention. In England and certain American jurisdictions trading ventures involving the breach of foreign revenue laws are not regarded as coming within this provision, and therefore insurance in such cases may be recovered.[65]

94. **The two classes of average losses.**—The doctrine of general average in admiralty law may be illustrated as follows: A piano owned by X and duly insured is stored in the same warehouse with another piano owned by Y and also insured. A fire destroys X's piano but leaves Y's unharmed. X's insurer must stand all the loss. Where, in marine insurance, the loss falls entirely upon the one, out of several, who have property on board the same vessel, such a loss is called a "particular average loss."

General average losses are also recognized in marine, though not in fire insurance, as when the master of a vessel is forced to sacrifice a hundred bales of cotton, all belonging to X, in order to save the ship with a remaining hundred bales on board

[64] Arnold v. Pacific Mutual Ins. Co., 78 N. Y. 7.
[65] Parker v. Jones, 13 Mass. 173.

belonging to Y, the loss will fall proportionately on X's and Y's insurance companies, and on the other interests in the common venture. The exact scope of the doctrine of general average loss is a matter of considerable difficulty and prolixity in admiralty law.

95. **Total losses, actual and constructive.**—Actual total loss in marine insurance is virtually the same as in fire insurance. When the vessel is rendered worthless to the insured she becomes a total loss. She may sink without being a total loss, if she can be raised by an expenditure of less money than she is worth.[66] On the other hand, she may stay on the surface and yet be reduced to a worthless mass.[67] Valued policies frequently exist by the agreement of the parties in marine insurance. These have been explained in connection with fire insurance.[68] Probably our American legislators borrowed the idea of valued policy laws in fire insurance from this practice of marine insurance companies.

Constructive total loss. In the United States, a constructive total loss exists when the injuries insured against have rendered the ship worth less than fifty per cent of what her value would be if restored to the condition in which she was before she was injured. This "fifty per cent rule" is not accepted in England. There, constructive and actual total losses differ but slightly. The English rule might be called a hundred per cent rule. The cost of recovery must exceed the value when recovered.

[66] Sewall v. U. S. Ins. Co., 11 Pick. 90 (Mass.).
[67] Bullard v. Roger Williams Ins. Co., Fed. Cas. No. 2, 122.
[68] See § 75.

96. **Abandonment.**—In case of constructive total loss the insured may recover on the basis of the partial loss sustained, or he may abandon the damaged ship to the underwriter and recover the same amount as in case of a total loss. This doctrine of abandonment is peculiar to marine insurance, though, out of abundant caution, many fire policies expressly forbid abandonment. The insured is thus given an option to abandon or not, as he sees fit. The insurer is given no election, though in many cases the marine insurance company declines to accept the ship when abandoned. In doing so it acts at its peril. If the insured can show that abandonment was proper, the insurer can be held as for a total loss, though only for the partial loss if the refusal was proper. It is obvious that, on abandonment, the insurer, by virtue of the doctrine of subrogation, succeeds to the rights of the insured against any third party who may be responsible for having caused the loss of the insured.

97. **One-third off new for old.**—If the side of an old vessel is crushed in there may be but one practicable way to repair her. Let us assume this mode of repair requires the use of new materials which will make her worth more than before the accident. Accordingly, the rule is established that in case of partial loss, "one-third off new for old" is allowed the insurer. For example, if it costs $300 to repair her, the insurer is liable for but $200 regardless of whether the ship has been sailing for one or a hundred years.[69]

98. **Sue and labor clause.**—If the owner of a house

[69] Humphreys v. Union Ins. Co., Fed. Cas. No. 6871.

fears that an extraordinarily hot fire in his stove may cause the house to burn and proceeds to drench the room with water to prevent the fire, he can recover nothing from the insurer of the house and furniture because no hostile fire has existed.

In marine insurance the rule is otherwise. If it is necessary for the insured "to sue, labor, and travel for, in, and about the defense, safeguard and recovery" of the property insured, the insurance company agrees to indemnify the insured as in case of a loss of an equal amount. Under this clause, the insurer may be liable for more than the amount stated in the policy, where a loss and the expenses of the attempt to avoid the loss exceed the stated amount of insurance.

There can be no recovery under this provision unless the work was done by the assured or one in his employment, and to prevent or lessen a loss for which the insurer would otherwise be liable.[70]

[70] Kidston v. Empire Marine Ins. Co., L. R. 2 C. P. 357 (Eng.).

CHAPTER XII.

ACCIDENT INSURANCE.

99. **The accident insurance business.**—The accident insurance business originated in England and the United States in the middle of the nineteenth century. At first it was designed, primarily, to insure against risks of travel, and grew in importance along with railroads and other means of rapid transportation, together with the wide use of dangerous machinery. The significance of this branch of insurance may be judged by the fact that accident companies received over twenty million dollars in premiums in 1911 in the United States alone. Though Lord Campbell's Act and kindred legislation have provided for the recovery of damages for death by wrongful act, the amount of recovery is generally limited. Many items of loss are not included in fixing the damages in proceedings under these acts. Accident insurance is a necessary supplement for adequate protection.

Endless litigation has resulted from the attempt to define the term "accident" and the excepted cases which the insurance company does not pretend to cover.

100. **What is an accident?**—It is not easy to determine what is and what is not an accident even in the popular sense of the term. It is well said that acci-

dents are always happening to careless people, though but seldom to persons of great caution. A reconciliation of the authorities is out of the question. Accidents cannot be very accurately classified because infinite in variety and number. Where the insured took out accident insurance and then met death by lynching at the hands of a mob, his death was deemed the result of accident in Mississippi.[71] In like manner, where the insured intentionally trimmed a corn, but unexpectedly caused blood-poisoning, which resulted in his death, it was held that his death was caused by accident.[72] Taking poison by mistake has been held to be one form of accident, though if one intends to take as much as he actually took, but is mistaken merely as to the effect of the size of dose taken, no accident has occurred.[73] Where one, sick and half asleep, became entangled in his nightshirt in an effort to dress hurriedly, and broke a blood vessel in his attempt to extricate his head, recovery was denied on the ground that the injury resulted from voluntary movements.[74] In like manner, the insurer was held not liable where death was caused by peritonitis resulting from the regular movements of a bicycle.[75] Accident, for this purpose, may be the result of the intentional act of another. For example, take the case of lynching already mentioned in this section.

External and violent means. The accident insur-

[71] Fidelity & Casualty Co. v. Johnson, 72 Miss. 333, 30 L. R. A. 206.
[72] Nax v. Travelers' Ins. Co., 130 Fed. 985.
[73] Carnes v. Iowa, etc., Assn., 106 Iowa 281, 76 N. W. 683.
[74] Smouse v. Iowa, etc., Assn., 118 Iowa 436, 92 N. W. 53.
[75] Appel v. Aetna Ins. Co., 83 N. Y. Supp. 238, 180 N. Y. 514.

ance companies have stipulated that the accident must be the result of external and violent means. These words, as construed by the courts, mean merely that some cause of the injury must have existed outside of the body of the insured and must have produced injury. Death from inhalation of gas is an accident resulting from external and violent means for this purpose.[76]

Accident as the cause of injury. An accident must be the cause of the injury to warrant recovery. In many cases an accident follows illness, or illness follows an accident in such a manner as to show causal connection. Other combinations may be suggested; for example, disease, apparent recovery, then accident which would otherwise be harmless but becomes serious because it brings back the old disease. The policy frequently provides that the injury must result from accident, "independently of all other causes." In the leading English decision on this question[77] the insured, while at a railway station, was seized with a fit and fell off the platform. Then a train which was passing ran over him. This was held to be an accident, not a mere consequence of the disease which induced the fit.

101. **Visible mark of injury.**—The requirement that there must be a visible mark of injury has accomplished virtually nothing in restricting the insurer's liability. The decisions lead us to the conclusion that "visible" here means merely capable of being determined, not merely by sight, but by any

[76] Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347.
[77] Lawrence v. Accidental Ins. Co., 7 Q. B. D. 216 (Eng.).

of the human senses. Thus, where the only mark of asphyxiation was the emanation of illuminating gas from the body when artificial respiration was produced, this was held to be both an external and visible mark of injury.[78] The mark may be hidden under the surface of the body. It is sufficient if it become visible when the body is dissected. For example, the discoloration of a part of the brain is sufficient, though brought to light only by an autopsy.[79]

102. **Excepted risks.**—One common form of accident policy provides as follows: "This insurance does not cover disappearances; nor suicide, sane or insane; nor injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark); nor accident, nor death, nor loss of limb or sight, nor disability resulting wholly or partly, directly or indirectly, from any of the following causes, or while engaged or affected: Disease or bodily infirmity, hernia, fits, vertigo, sleep-walking; medical or surgical treatment except amputations necessitated solely by injuries and made within ninety days after accident; intoxication or narcotics; voluntary or involuntary taking of poison or contact with poisonous substances or inhaling of any gas or vapor; sunstroke or freezing; dueling or fighting, war or riot; intentional injuries (inflicted by the insured or any other person); voluntary over-exertion; violating law; violating rules of a corporation; voluntary exposure to unnecessary danger; expedi-

[78] Menneilley v. Employers' Liability Assur. Assn., 148 N. Y. 596, 31 L. R. A. 686.

[79] Union Casualty & Surety Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677.

tions into wild or uncivilized countries; entering or trying to enter or leave a moving conveyance using steam as a motive power (except cable cars), riding in or on any such conveyances not provided for transportation of passengers, walking or being on a railway bridge or roadbed (railway employees excepted)."

103. **Same subject—Accident while intoxicated.**—Under the express provisions of many accident policies, no recovery is allowed by reason of accidents occurring while the insured is intoxicated. The company need not show that the intoxication caused the accident. Proof of the coexistence of the two is sufficient to prevent recovery. Thus, where the insured, while intoxicated, allowed a friend to shoot through the insured's ear and was killed in the attempt, no recovery was allowed.[80] Probably, under this clause, no recovery would be allowed if plastering fell off a ceiling and hit the insured while in bed and asleep soon after an over-indulgence.

104. **Same subject—Injury from poison.**—Accident companies frequently stipulated against liability for injury resulting from "taking poison." This was generally held to refer only to an intentional and conscious taking of poison, not to the taking of poison by mistake, nor to an unconscious absorption of poison into the system. Therefore, the companies extended the exemption to "poison in any way taken." The courts then held that this referred, for example, to the liquid or powdered state of the poison, not to the intention or consciousness of the

[80] Shader v. Railway Pass. Assur. Co., 66 N. Y. 441, 23 Am. Rep. 65.

insured at the time of the poisoning.[81] Hence, the companies gained little or nothing by the addition of these words. However, a clause now frequently used relieves the company from liability for the "voluntary or involuntary taking of poison or contact with poisonous substances." This provision and similar ones seem to have accomplished the purpose of the insurers.[82]

105. **Same subject—Inhalation of gas.**—Many accident companies have sought to escape liability for death caused by inhalation of gas. The courts have been inclined to construe such exceptions as referring only to intentional inhalations of gas, as, in the dentist's chair, or preliminary to a surgical operation. An Illinois case has come close to outdistancing others in allowing recovery.[83] The policy in question contained a stipulation against liability for "death * * * resulting, wholly or partly, directly or indirectly * * * from any gas or vapor." The insured was killed by the accidental inhalation of gas while asleep. The insurer was held liable in view of the state of the authorities and the strict construction which, the court held, must be given to such provisions.

106. **Same subject—Intentional injuries.**—Many policies provide against liability for "intentional injuries inflicted by the insured or any other person." This exception has been construed by the courts in accordance with its obvious purpose. A comparison between the principles which are applicable in this

[81] Metropolitan, etc., Assn. v. Froiland, 161 Ill. 30, 52 Am. St. Rep. 359.
[82] Maryland Casualty Co. v. Hudgins, 97 Tex. 124, 64 L. R. A. 349.
[83] Travelers' Ins. Co. v. Ayers, 217 Ill. 390, 75 N. E. 506.

connection and in criminal law is of interest. If one, with deliberation and premeditation, shoots at X intending to kill him, but, through poor aiming, kills Y instead, he is guilty of murder "in the first degree"; that is, for our purpose, deliberate murder. But Y's estate would probably be allowed to recover accident insurance, even though this clause excepting intentional injuries is inserted in the policy.[84]

107. **Total disability or loss of a member.**—We have already considered total losses in fire and marine insurance. The question does not arise in life insurance, but appears in this form in accident insurance: When is one totally disabled? The answer depends to some extent upon the clause in the policy. Certain policies stipulate that total disability arises only when the insured is incapable of engaging in "any and every kind of business pertaining to his occupation."

The general rule on this question may remind the student of agency of the obligation of the wrongfully discharged agent to seek other and similar employment, though not all kinds of work. In a leading case[85] the plaintiff was a "billiard-saloon keeper." He admitted that, after the accident, he could still do certain acts necessary in his business, but introduced evidence to prove that he was wholly disabled from doing many of the material acts necessary. Recovery as for a total disability was allowed. The court suggested the following analogy: "Suppose a barber who can use his razor and shears in his right

[84] Richards v. Ins. Co., 89 Cal. 170, 23 Am. St. 455.
[85] Young v. Travelers' Ins. Co., 80 Me. 244, 13 Atl. 896.

hand only, but can use his left to wipe his customer's face, comb and dress his hair, and receive pay and make change, by an accident is wholly deprived of the use of his right hand, so that he can neither shave his customer nor cut his hair, can it be said that he is not wholly disabled from the prosecution of his business as a barber? An accident policy which would not afford indemnity in such a case would be a delusion and a snare."

Loss of a member. A member of one's body may be lost for the purpose of recovering accident insurance, though it is not severed from the body. For example, a ball from a pistol hit the insured in the back and caused the entire destruction of the use of both feet by paralysis. He was allowed to recover for the loss of "two entire feet."[86]

[86] Sheanon v. Pacific, etc., Ins. Co., 77 Wis. 618, 9 L. R. A. 685.

CHAPTER XIII.

GUARANTY AND LIABILITY INSURANCE.

108. **Guaranty insurance.**—The close connection between the law of suretyship and the law of insurance is plainly in evidence in the rise of many forms of guaranty insurance corporations which are taking over, gradually, the duties of suretyship formerly shouldered by friends and relatives, and private individuals who made a business of acting as sureties. The term "guaranty insurance" is applied to guaranties of real estate titles, or title insurance, credit insurance, and, in particular, to fidelity insurance, which is designed to protect employers against the defaults of their employees.

Guaranty insurance is governed generally by the rules of suretyship, many of which have been established for centuries. However, the maxim of suretyship that the surety is a favorite of the law and is to be favored in cases of doubtful construction is not applied in favor of guaranty insurers. The rule of insurance, that the contract must be construed strictly against the insurer because drawn by him, is adopted.[87]

109. **Liability insurance.**—Many forms of liability insurance have appeared in recent years. Such insurance is designed to indemnify the insured

[87] Amer. Surety Co. v. Pauly, 170 U. S. 133, 144.

against all losses sustained by him through legal proceedings growing out of personal injuries received by the insured's employees and third parties. One of the most important forms is employers' liability insurance, which covers not only the actual damages assessed, but incidental costs and attorney's fees which would otherwise fall on the insured in actions by injured employees. Generally the insured is required to give immediate notice to the insurer when sued by the injured person. The insurer then steps in and takes full charge of the defense.

In determining the rights of the injured person directly or indirectly against the insurer, two forms of contracts should be distinguished. Conceivably, a policy might be so worded as to make the injured person a beneficiary thereunder with a right to sue the insurer directly. However, such cases have arisen but rarely. Generally, the injured person has no rights whatsoever against the insurer except as a general creditor of the insured. Whether or not the insurer has settled with the insured is no concern of the person injured.[88]

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[88] Embler v. Hartford, etc., Ins. Co., 158 N. Y. 431, 44 L. R. A. 512.

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ADMIRALTY LAW

BY

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CHAPTER I.

THE HISTORY AND DEVELOPMENT OF ADMIRALTY LAW.

1. **Nature of admiralty law.**—Admiralty law is that branch of law which governs transactions upon the sea and navigable waters. The law of the admiralty and the procedure of courts of admiralty are peculiar and distinct from those of the courts either of equity or of common law. The law of the admiralty is one of the most ancient and venerable branches of the law, and is one of the most interesting in various respects. It prescribes the duties and governs the liabilities of ship-owners, mariners, and merchants engaged in foreign commerce. For a student of the philosophy of law, it is peculiarly interesting because its history shows more clearly than that of any other department of the law the fact that all law has its origin in custom. The law of the admiralty took its rise in the customs of the sea and of commerce, and the procedure of the courts of admiralty took its rise in the customs of those courts; and there

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is no branch of law which shows as clearly as the admiralty law the fact that law is based on custom.

2. **Origin of admiralty law and courts.**—When, after the Middle Ages, commerce revived, the consuls of different countries, at the principal ports, naturally became arbitrators of questions arising in commerce, and in this way a system of consular courts arose. These courts decided questions in relation to the navigation of vessels in accordance with the customs of navigators, and questions arising in maritime commerce in accordance with the customs of merchants. In this way there gradually developed a rude law of the sea. This law was formulated, at an early age, in various codes or rules.

3. **The earliest admiralty codes.**—The earliest of these maritime codes was the code commonly called the Consolato del Mare. This book was originally written in the Catalan dialect, at Barcelona, probably in the thirteenth or fourteenth century. It was in its Italian translation called the Consolato del Mare, and under that title it became most widely known.

The next oldest of these codes were the Laws or Rules of Oleron. Oleron is an island off the French coast, in the Bay of Biscay. The Laws of Oleron were originally written in the language of Gascony. The fact that there was no English admiralty code then existing led to the Laws of Oleron being adopted as the law of the admiralty in England. They practically governed commerce in the English Channel and on the coast of France outside the Mediterranean. The Laws of Wisbuy were probably first formulated about 1300. Wisbuy was a city on the Island of

Gothland, in the Baltic Sea. The city has now almost absolutely disappeared, but it was, in the Middle Ages, a flourishing commercial city. These three codes originally constituted the maritime law of Europe, the Consolato del Mare furnishing the maritime law on the Mediterranean, the Laws of Oleron in the waters about France and England, and the Laws of Wisbuy in the Baltic Sea.

There are also later codes. The Laws of the Hanse Towns were probably first promulgated about 1590. All these codes deal rudely with most of the subjects of the jurisdiction of the consular courts, and with the rights and duties of the master and sailors.

4. **Jurisdiction of the consular courts.**—These consular courts are described in the Consolato del Mare as having exclusive jurisdiction in all controversies respecting freights; damages to goods shipped; wages of mariners; partition of ships by public sale; jettison; debts of masters for necessaries; agreement between master and merchants; goods found on sea or shore; and generally of all contracts governed by the customs of the sea. There is nothing in the old codes about marine insurance. There was no such thing until about the seventeenth century. The Marine Ordinance of Louis XIV, which constitutes a large and admirable maritime code, much more complete and modern than anything which preceded it, first treats of the subject of marine insurance. There is a translation of the Consolato del Mare in Sir Travers Twiss' edition of the Black Book of the Admiralty, and of the Laws of Oleron, of Wisbuy, of the Hanse Towns, and the Marine

Ordinance of Louis XIV, printed as an appendix to the thirtieth volume of the Federal Cases.

5. **The origin of the English Court of Admiralty.**—In England, soon after the revival of commerce, the office of Admiral was created, and the Admiral became the head of the British fleet. In that position, he naturally had to determine various questions arising in his department. The result was the establishment of an Admiral's Court. As the English navy and English shipping developed, there became established a governing board called the Admiralty, under which existed the Court of Admiralty which administered the maritime law of England. The foundation of that law was the general admiralty law of the Continent, the English Courts of Admiralty particularly giving great weight to the Laws of Oleron. The Court of Admiralty in England had become well established at an early age, but a conflict arose between the English common law courts and the admiralty court. The procedure in the ancient admiralty court was expensive and dilatory, in marked contrast to the simple and prompt procedure in the common law courts, and statutes were passed at the time of Richard II restricting the jurisdiction of the admiralty courts entirely to the sea and to waters where the tide ebbed and flowed.

6. **The former limited jurisdiction of the English Court of Admiralty.**—Later the judges of the common law courts partook of the popular feeling, and for many years the common law judges, and particularly Sir Edward Coke, the famous Chief Justice, denied and restricted the jurisdiction of the admi-

ralty court in many respects. For instance, it became the rule in England that admiralty had no jurisdiction except where the tide ebbed and flowed. It had no jurisdiction of any contract made on land to be performed on water, or made on water to be performed on land. This excluded all jurisdiction of suits on charter parties, policies of marine insurance, bills of lading, and substantially all maritime contracts except sailors' wages and bottomry bonds, both of which logically should have been excluded. The rule also excluded all torts or crimes committed within the body of a country or where the common law courts had jurisdiction, thus taking away from the admiralty courts jurisdiction of all torts or crimes committed on rivers or in harbors, and substantially on any waters except on the high seas. The result was that the jurisdiction of the English admiralty courts at the time of our Revolution was very much more restricted than that of the admiralty courts of any other country in Europe. In the last century, however, by an Act of Parliament, the original jurisdiction of the English admiralty courts was largely restored, so that at the present time these courts exercise nearly the same jurisdiction that the admiralty courts of other countries exercise.

7. **The colonial admiralty courts.**—Prior to the American Revolution, the various colonies had admiralty courts existing by virtue of commissions from the Crown. These commissions, drawn in general terms, ordinarily conferred a wide admiralty jurisdiction, and the colonial courts before the Revolution usually followed the general principles of admiralty

law as declared on the continent of Europe, although in some respects they were influenced by the narrower doctrine of the English law. During and after the Revolution, the various states which were formerly colonies continued these admiralty courts as they existed, and they were in active operation up to the time of the adoption of the Constitution. Thereafter admiralty jurisdiction was granted in the Constitution and the Judiciary Act.

CHAPTER II.

THE JURISDICTION OF THE AMERICAN COURTS OF ADMIRALTY.

8. **The constitutional provision concerning admiralty law.**—Article III, § 2, of the United States Constitution provides that "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

Section 9 of the Judiciary Act of 1789 provided that "the district courts * * * shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," and this section is substantially reënacted in the United States Revised Statutes, § 563, subdivision 8.

Upon these sections of the Constitution and the Judiciary Act the admiralty jurisdiction of the federal courts substantially depends. No attempt is made in them to define what are cases of admiralty and maritime jurisdiction. Those questions were left to be determined by the recognized admiralty law as it existed at the time of the adoption of the Constitution as construed by the courts. The admiralty law as it then existed has been modified to some extent by statutes, such as the act limiting the liability of shipowners, the Harter Act, and others; but it still remains true that the greatest part of the existing admiralty law has existed for centuries and took its rise in the customs of commerce and of the sea.

9. **The American test of admiralty jurisdiction.**—The rule in this country is that all navigable waters are subject to admiralty jurisdiction. The rule in England was that the admiralty jurisdiction was restricted to waters in which the tide ebbed and flowed. This rule, in England, was practically equivalent to making navigability the test, as there are very few rivers in England which are navigable beyond the point at which the tide ebbs and flows. The English rule was at first followed in this country. Under that rule, of course, large parts of the great rivers and all of the Great Lakes were excluded from admiralty jurisdiction. When the commerce upon the Great Lakes and rivers became large enough to make the question important, the rule was changed so as to make navigability instead of the ebb and flow of the tide the test of the admiralty jurisdiction.[1] The admiralty law does not apply to navigable waters entirely within the limits of a state, but it does apply to all parts of a waterway between states, even if a part of such waterway is an artificial canal entirely within the limits of a state.[2] It applies to vessels on voyages in such an artificial waterway, although the voyage has begun and is intended to end in the same state. But such artificial waterways must be large and sustain a commerce of a substantial character.

10. **Vessels subject to admiralty jurisdiction.**—The admiralty jurisdiction extends to any movable floating structure capable of navigation and designed for navigation. It includes lighters, carfloats, float-

[1] The Genesee Chief, 12 How. 463 (U. S.).

[2] In re Garnett, 141 U. S. 1; The Daniel Ball, 10 Wall. 557 (U. S.).

ing docks, dredges, and barges with no motive power aboard. It does not include a floating drydock permanently attached to the shore,[3] and not intended for navigation, or a floating gas buoy.[4]

11. **The admiralty jurisdiction over contracts.**— The test of admiralty jurisdiction in cases of contracts is whether the nature of the transaction was maritime.[5] The test of admiralty jurisdiction in cases of tort is the locality, whether the tort has arisen on public navigable waters.[6] As the test of admiralty jurisdiction in cases of contract is whether the contract relates to a maritime transaction, it follows that the admiralty has no jurisdiction over the following contracts: A contract to build a ship, which is regarded as a contract relating to a transaction wholly on land;[7] a contract of partnership in a trade venture, in which one of the parties contributes the vessel and the other his skill in labor;[8] a mortgage on a ship for money borrowed for a purpose unconnected with the use of the vessel;[9] a suit for an accounting, even if the accounts relate to a ship.[10] An agreement to make a charter party is not maritime,[11] although a charter party is purely maritime. A contract to pay wharfage while loading or unloading a ship, or in her regular use in navigation, is a maritime con-

[3] Cope v. Vallette, etc., Co., 119 U. S. 625.
[4] Gas Float Whitten (No. 2), (1897) App. Cas. 337 (Eng.).
[5] New England, etc., Co. v. Dunham, 11 Wall. 1 (U. S.).
[6] The Plymouth, 3 Wall. 20 (U. S.); Ex parte Phenix Ins. Co., 118 U. S. 610.
[7] People's, etc., Co. v. Beers, 20 How. 393 (U. S.).
[8] Ward v. Thompson, 22 How. 330 (U. S.).
[9] Bogart v. The John Jay, 17 How. 399 (U. S.).
[10] Minturn v. Maynard, 17 How. 477 (U. S.).
[11] The Eugene, 87 Fed. 1001.

tract,[12] but not wharfage for a ship laid up for the winter.[13] The admiralty has jurisdiction of all contracts which are maritime in their nature, such as charter parties, marine insurance policies, bills of lading, seamen's wages, and suits on bottomry or respondentia bonds.

12. **Admiralty jurisdiction over torts.**—The admiralty has jurisdiction of torts occurring on navigable waters. A tort must be entirely consummated on the water. The fact that it commences upon the water does not give jurisdiction if the injury itself is inflicted on the shore. Thus, the admiralty has no jurisdiction in the case of a fire which, originating on a ship, damaged buildings on shore;[14] nor damages to a bridge caused by the negligent navigation of a vessel.[15]

13. **Injuries to crew or passengers.**—The legal relations between the crew and the ship or her owners are substantially the same as between master and servant at common law, so far as relates to the question of torts to the person. The common law doctrine of fellow servants applies. The relations between the passengers and the ship or her owners are governed by the general law of passenger carriers, except as modified by statute. The United States Revised Statutes contain elaborate provisions for the protection of passengers.[16]

[12] Ex parte Easton, 95 U. S. 68.

[13] The C. Vanderbilt, 86 Fed. 785.

[14] The Plymouth, 3 Wall. 20 (U. S.).

[15] Johnson v. Chicago, etc., Co., 119 U. S. 388; Cleveland, etc., Co. v. Cleveland, etc., Co., 208 U. S. 316.

[16] §§ 4252-4289, 4463-4500.

The doctrine of imputed negligence by which a person on a ship not identified with its management was formerly held in some cases chargeable with the negligence of his own vehicle is no longer followed. As the law now stands, a person injured on a vessel in collision can proceed against either vessel, as either or both are negligent.[17] The admiralty has jurisdiction of assaults upon navigable waters. Under the Supreme Court admiralty rule 16 there is no remedy in rem against the ship for such assaults. There is such a remedy against the owner, if the assault is made by any of the crew in the course of his employment.[18]

14. **Liability for injuries causing death.**—By the common law, and by the civil law, there was no right of action for injuries causing death. For several centuries past, the leading Continental nations have permitted a recovery in admiralty for death claims. In England, there is no right of action in admiralty for injuries resulting in death. In this country, the decisions have been extremely conflicting. The trend of decisions is that the admiralty has no independent jurisdiction in such cases, but wherever a state statute gives a cause of action, the admiralty can enforce it when occurring upon a vessel of such state. Congress could undoubtedly give such a right of action by statute. But the law governing in suits of this kind is the law of the place where the negligent killing occurred, if it arose within the jurisdiction of any

[17] Little v. Hackett, 116 U. S. 366.

[18] Chamberlain v. Chandler, 3 Mason 242 (U. S.); The Miami, 78 Fed. 818.

particular state, or, if not, the law of the flag, if it arose on the high seas.

15. **Collisions.**—A common class of actions in the admiralty arising in tort are cases of collisions between vessels. The law applicable to them is now very largely governed by the rules for preventing collisions at sea, adopted by Congress.

16. **Jurisdiction of liens for repairs and supplies.**—Although all incidental controversies growing out of the building of a ship are not subjects of admiralty jurisdiction, the rule is entirely different in respect to repairs and supplies furnished to a ship after it has been launched. The general rule of the admiralty is that the cost of repairs, supplies, or necessaries furnished to a vessel in a foreign port, on the order of the master, in the absence of the owner, creates a maritime lien on the vessel, in the absence of an explicit agreement to the contrary.[19] The test of the master's power to create such a maritime lien is the necessity for the repairs and supplies. This power of the master, however, is a power implied as agent of the owner in the owner's absence, and therefore, if the owner is present in the foreign port, the master has no such implied power.[20] In any case, an owner may bind the vessel by agreeing with the materialman that the expenses shall be a lien on the vessel. A foreign port is not simply a port of a foreign country, but the ports in each state in this country are foreign to each other.[21] These maritime liens take

[19] The Kalorama, 10 Wall. 204 (U. S.).
[20] The Valencia, 165 U. S. 264.
[21] The Kalorama, 10 Wall. 204 (U. S.).

precedence of common law liens on the theory that, being intended to keep the ship going, they are for the benefit of other liens, as tending to the preservation of the *res* (thing). Therefore, a lien for supplies, even if not recorded, takes precedence of a prior recorded mortgage. Such claims are sometimes lost by delay in enforcing them. The doctrine of stale claims is stronger in the admiralty than in other branches of the law. Claims based on unrecorded maritime liens are held stale after a short time. As short a delay as three months has been held to render a claim stale as against an innocent purchaser. Not only has a materialman or supply man a lien for materials or supplies furnished, but also anyone who advances money on the credit of the vessel for the purpose of paying for such necessaries has a similar lien; but moneys advanced for other purposes, such as loans to the master for the payment of claims not maritime, create no such lien. The term "necessaries" includes such supplies and repairs as are necessary for the use of the ship. It does not include things which may be necessary in order to use the ship or save her from danger; for instance, seamen's wages, towage, or salvage.

17. **The Act authorizing a lien for supplies in a domestic port.**—Until the Act of June 23, 1910, authorizing a lien for supplies or other necessaries furnished to a domestic vessel, there was no implied lien on such domestic vessel for supplies. This Act authorizes a lien for supplies furnished in a home port, to the same extent as when furnished in a foreign port.

18. **Bottomry and respondentia bonds.**—Almost identical with the maritime lien created by the furnishing of supplies or necessaries is the lien created by bottomry and respondentia bonds. A bottomry bond binds the ship, or the ship and cargo. A respondentia bond binds the cargo only. The requisites for the validity of a bottomry or respondentia bond are that it be given in a foreign port for repairs, supplies, or loans which are necessary, and which the master or owner has no apparent funds or credit to pay for. It is the duty of the master to communicate with the owner of the ship or cargo, if possible, before giving a bottomry or respondentia bond. Such bonds in former times, when communication with foreign ports was difficult and slow, were very common. They are now becoming very uncommon, because there are few ports in the world where a ship can go in which telegraphic communication with the owner of the ship cannot be had.

CHAPTER III.

THE OWNERSHIP OF VESSELS.

19. **The transfer of vessels.**—A vessel is personal property. No bill of sale or writing of any kind is strictly necessary to transfer title to a vessel, but under the United States Revised Statutes, § 4170, a bill of sale is necessary for the registration or enrollment of a vessel, and therefore practically the title to a vessel is always transferred by a written bill of sale. No bill of sale, mortgage, hypothecation, or conveyance of a vessel, unless recorded in the Custom House, is valid against a grantee or mortgagee without notice. The proper place to register or enroll a vessel is with the collector of the district in or nearest to which the owner, if but one, or, if more than one, the ship's husband or managing owner, resides. The bill of sale must set out exactly the interest of each person selling and purchasing.

20. **The use of vessels.**—The vessel owners are liable *in solido* (in the whole) for debts or torts incurred in the regular course of business by the master or managing owner. But the minority owners who have dissented from the use of the vessel at all on a particular voyage are not so liable.

21. **Limitation of liability.**—Under the ancient admiralty law in the south of Europe, the liability of the owner of a vessel was limited to the value of the vessel and its freight. The liability in England

is now limited to an amount equal to £8 per ton for loss or injury to property, and to £15 per ton for loss of life or personal injury. In this country, under the Act of 1851 as amended, now §§ 4282 to 4289 of the Revised Statutes, the limitation of liability is absolute on surrender of the vessel and pending freight. The provisions of the American Act apply to foreign as well as to American ships, and even in the case of collisions between ships of the same nation, the right of limitation is absolute.[22] It does not require that any insurance on the vessel be surrendered.[23] The practical consequence is that if a vessel whose negligence has caused a collision is sunk by the collision, the owners may be entirely reimbursed by the insurance, but the ship, cargo, or persons injured by the collision have usually no substantial remedy. The Act limiting the liability applies to claims *ex delicto* (out of tort) and *ex contractu* (out of contract). It covers personal injuries, including those causing death. The acts or defects causing the damage must have been without the owner's privity or knowledge. Knowledge of an agent is immaterial, unless it be the president or high officer of a corporation.

Limitation of liability cannot be claimed against liabilities contracted by the owners personally, as claims for supplies ordered by the owners. The English courts have construed the English Act as fixing the value just before the disaster. The American courts have construed the American Act as fixing the

[22] The Titanic, 233 U. S. 718.
[23] The Scotland, 118 U. S. 507.

value at the end of the voyage. The res must be surrendered entirely free of prior liens; otherwise, the owners could always mortgage and make the value of the thing surrendered trifling. The owner must surrender any damage recovered from other vessels, and pending freight, including the passenger fare prepaid, must be surrendered. The Act may be set up either as a defense to a suit in any court, or an independent proceeding may be brought in admiralty. The practice in such a case is to appoint a trustee and order a reference to take proof of claims and an injunction against pending suits. All claims in such a proceeding are paid pro rata. Admiralty liens give no advantage.

22. **Maritime liens.**—Maritime liens differ radically from common law liens. A maritime lien is a *jus in re* (right in a thing). It does not depend on possession, and it gives no right to possession. It can be enforced only by a proceeding *in rem* (against the thing). The authorities are not clear in all respects in relation to the relative rank of maritime liens. Tort claims take precedence.[24] There is no doubt in respect to the rule in the case of pure torts like collisions. The reason is that the vessel as a whole is considered a wrongdoer. The various claims already existing against the offending vessel are immaterial to the party injured. All tort claims rank prior contract claims, and probably subsequent contract claims, where the injured party has a right of action against the owner *in personam* (in person).

Salvage claims take rank over all contract claims

[24] The John G. Stevens, 170 U. S. 113.

except subsequent seamen's wages.[25] The reason is that the salvors saved the res. Seamen's wages rank all other contract claims except subsequent salvage claims.[26] It was the ancient rule that seamen's wages are nailed to the last plank of the ship. The reason is that but for the seamen's services the ship would not have reached port. Claims for materials, supplies, advances, towage, pilotage, and general average rank equally in the absence of special circumstances. Bottomry ranks low among maritime liens, because the risk is compensated for by a high rate of interest.

23. **Mortgages.**—A mortgage on a vessel does not create a maritime lien.[27] A mortgage cannot be foreclosed in the admiralty. The recording of a mortgage does not affect this principle. But when the proceeds of the sale of a ship are in the registry for distribution, admiralty awards payment to a mortgagee after all maritime liens are paid.

24. **Contracts of affreightment.**—A vessel may be operated by her owners, or leased to others. If she is operated by the owners on their own account, on contracts direct with the shippers, such contracts are called contracts of affreightment. The reward which a vessel earns for transporting merchandise is called freight. The rules regarding freight often apply to the compensation for carrying passengers. In contracts of affreightment there are two implied warranties: one of seaworthiness, and the other against

[25] The Fort Wayne, 1 Bond 476 (U. S.).
[26] The Virgo, 46 Fed. 294.
[27] The J. E. Rumbell, 148 U. S. 1.

deviation. The warranty of seaworthiness, so far as the rights of the ship are concerned, is one of the most rigid known to the law. It is a warranty that at the commencement of the voyage the vessel shall be thoroughly fitted for the voyage. It is more than a warranty that the owner will exercise reasonable care. It is an absolute warranty of fitness for the voyage, even against latent and entirely unsuspected defects.[28] A warranty against deviation is that the vessel will pursue her proposed voyage by the accustomed route without unnecessary delay.[29] It is one of the ancient doctrines of the admiralty that the ship is pledged to the cargo and the cargo to the ship for the fulfillment of the contract of carriage. The cargo has a lien on the ship if it is not properly delivered, and the ship has a lien on the cargo for the freight money. The lien on the cargo for the freight money differs from the ordinary admiralty lien, and is similar to a common law lien in being dependent upon actual or constructive possession. The vessel owner who delivers the cargo or possession of it to the consignee loses his lien on the cargo for the freight. Freight, however, is not due until the cargo is unloaded and the consignee has had an opportunity to inspect the goods. The master cannot demand freight before unloading, nor can the consignee demand the goods before paying the freight. The proper procedure is to discharge the goods in a pile by themselves on the wharf, or into a warehouse, notifying the consignee that the lien for freight is not abandoned; then if the consignee, after

[28] The Caledonia, 157 U. S. 124.
[29] Hostetter v. Park, 137 U. S. 30.

a reasonable time for inspection, does not pay the freight, the master can proceed in rem against the goods.[30]

25. **Contract of affreightment an entire contract.**—The contract of affreightment is an entire contract, so that the general rule is that the freight is not earned until the contract is completed. Under this principle, in case of a marine disaster, the master has the right to repair the vessel and complete the voyage, or he may transship the goods into another vessel and so save the freight. If neither of these can be done profitably, he may sell the goods, but if he does not complete the voyage he is not entitled to freight. The parties, however, may by mutual agreement provide for paying freight pro rata at an intermediate port, if the voyage is broken up, and this agreement may be implied if the consignee voluntarily receives his goods at such an intermediate port.

26. **When a ship is a common carrier.**—A ship may or may not be a common carrier. A common carrier exercises a public employment, and must undertake to carry goods for persons generally as a business. Regular liners are common carriers. On the other hand, a ship chartered for a special cargo or for a special purpose is not a common carrier.

27. **Bills of lading.**—A bill of lading is a document evidencing the contract for shipment. It is usually given by the master directly to the shipper. It binds the vessel or her owners to the shipper. Originally it was a very simple paper, consisting substantially of a receipt for the goods, specifically de-

[30] Brittan v. Barnaby, 21 How. 527 (U. S.).

scribing them, and of a contract to carry and deliver them at a designated place of delivery. At the present time bills of lading, particularly through bills of lading for the carriage of property by rail and water for long distances, are often very complicated documents. A bill of lading given by the master of a vessel for goods not actually on board does not bind the vessel or its owner, under the decision of the federal courts,[31] although under the decisions of some of the state courts such a bill of lading is valid. Under the decisions in this country, a common carrier cannot stipulate for exemption from negligence in a bill of lading.[32] Bills of lading usually contain various exceptions. One is of "the perils of the sea." This usually means all inevitable accidents incident to the sea which are the proximate cause of the loss. The accident must arise independently of the crew's acts.

28. **Charter parties.**—If a vessel is leased to others, it is usually done by an instrument called a charter party. There are many different kinds of charter parties. A time charter is when the ship is hired for a definite time, as for a month or a year. A lump sum charter is one where a lump sum is paid for the ship for a certain time. A voyage charter is when she is hired for a definite voyage. A tonnage charter is where the charterer pays a certain rate per ton. There are charters relating to different kinds of business, as grain charters, cotton charters, petroleum charters, etc. An owner may demise his bare ship, leaving the charterer to furnish the crew, or he may

[31] Mo. Pac. Ry. Co. v. McFadden, 154 U. S. 155.
[32] New York, etc., Co. v. Lockwood, 17 Wall. 357 (U. S.).

charter the use of the ship, furnishing the crew himself. These different kinds of charters often give rise to important questions. If the crew are employed by the owner, they are his agents and he is responsible for their acts within the scope of their employment. If they are employed by the charterer, he, and not the owner, is responsible. Charter parties are generally to be governed by the ordinary rules of contract, but there are some special provisions applicable to them. Thus, a provision that a vessel shall proceed to the loading port with all possible dispatch is not a collateral clause, whose breach gives rise to an action for damages, but is a warranty, and a breach avoids the contract.[33]

29. **The Harter Act.**—An Act passed in 1893, commonly called the Harter Act, makes it the duty of the owner or master or agent of any vessel to give a bill of lading, and the Act prescribes in detail its contents. It provides, in the first section, that any provision in the bill of lading exempting the carrier from liability for damage arising from any negligence, fault, or failure in the proper loading, stowage, custody, care, or proper delivery of merchandise shall be null and void. Section 2 provides that it shall not be lawful to insert in a bill of lading any agreement whereby the obligation of the owner to exercise due diligence to equip, man, provision, and outfit the vessel properly and make the vessel seaworthy, or whereby the obligations of the master and crew to handle and stow the cargo carefully, and care for it and deliver it, shall be lessened. Section 3 provides

[33] Lowber v. Bangs, 2 Wall. 728 (U. S.).

that if the owner shall exercise due diligence to make the vessel seaworthy and properly manned, equipped, and supplied, neither the vessel nor her owners or charterers shall be responsible for damages resulting from faults or errors in navigation. The substantial effect of the Harter Act is that the owners are bound to provide, in the first instance, a seaworthy vessel, properly manned, equipped, and supplied. If they do that, damage caused by mere negligence in navigation they are not responsible for. All such damages must be covered by insurance.

CHAPTER IV.

THE NAVIGATION OF VESSELS.

30. **Stevedores.**—A stevedore is a workman who loads or discharges a ship and properly stows her cargo. The contract for such service is maritime, and gives a lien on foreign vessels, and on domestic vessels where a state statute gives it, and probably even in the absence of a state statute.

31. **Seamen.**—All persons employed in any capacity on a vessel at sea are considered seamen. They include fishermen, sealers, the cook's wife engaged as a second cook, the clerk of a steamboat, men operating a dredge, and all persons engaged in any manner in the service of a ship. Seamen are commonly spoken of as the wards of the admiralty. They are a class of men peculiarly improvident and unfamiliar with business, and by the admiralty law are not bound by their contracts to the same extent as ordinary persons. To enforce their contract of service, force may be employed on board a ship. Their contracts are governed ordinarily by the usual rules in the law of contracts except as modified by statute and the disposition of the courts to guard them from imposition. Sections 4501 to 4612 of the United States Revised Statutes contain elaborate statutory provisions for their protection. These statutes provide for the appointment of shipping commissioners wherever there is a port of entry, who shall generally superintend the employ-

ment and discharge of seamen. In shipping seamen, shipping articles are required to be signed in the presence of the commissioner. The shipping of seamen without such an agreement is prohibited. A copy of the shipping agreement, signed by the shipping commissioner and the master, is required to be posted up in a part of the vessel accessible to the crew before the voyage begins. This agreement is required to state the nature of the voyage, the duration of the voyage, the capacity in which each seaman is to serve, the amount of wages which each seaman is to receive, the scale of provisions to be furnished, and various other matters. There are statutory provisions that seamen's wages shall be paid whether freight is earned or not, reversing the old rule that freight is the mother of wages. Seamen's wages constitute, among contract claims, the first lien on a ship. They adhere to it as long as a plank is left afloat. There are certain instances in which other claims take precedence, as, for instance, the case of salvage, but among contract liens those for seamen's wages have priority. The master, however, has no right under admiralty law to proceed against the vessel for his own wages, or for any disbursements he may have made. The old reason assigned for this rule was that the master did not need a remedy, as he could pay himself out of the freight money. As a matter of fact, under modern conditions he rarely collects freight money. The real reason probably is that, as he is the trustee and representative of the owners in distant ports, he may, by seizing the vessel in a distant port, confiscate the ship at the very time that the

owners think he is protecting it. A master, of course, may sue in personam for his wages.

32. **Towage.**—Towage is a service rendered in the movement of uninjured vessels under ordinary circumstances of navigation. Many vessels do not have or use any motive power of their own. The towing of such vessels about harbors is now an enormous business, and the rights and obligations of tugs and tows are now very important in the admiralty. The distinction between towage and salvage is important. Towage is the propulsion of an uninjured vessel not in danger; salvage, the propulsion of a vessel disabled or in danger to a place of safety. The service may begin as towage service, and end as salvage service.

The tow is not liable for the tug's acts when the tug directs the navigation. It is liable for its own negligence and for the tug's negligence when the tow directs the navigation. In England, it is the practice for the tow to direct the navigation of the tug, and the English decisions are to the effect that the tow is responsible for the negligent navigation of the tug and tow. In this country, the rule is to the contrary.

33. **General average.**—General average is the principle of admiralty law which requires that all parties interested in a maritime venture shall contribute to make up the loss where there is a voluntary sacrifice of part of the venture made by the master for the benefit of all. This is one of the earliest known subjects of maritime law which is provided for in the Rhodian Code and all the ancient admiralty codes. For the purpose of general average the ship,

cargo, and freight are looked upon as a single maritime venture. Any loss voluntarily suffered for the safety of all is charged to all. For instance, if, in a storm, or when pursued by an enemy, a ship must be lightened in order to save her, and part of the cargo is thrown overboard for that purpose, or parts of the ship, like anchors, boats, etc., are thrown over, this is called the jettison, and whatever loss results, either to the cargo or to the ship, is made the subject of general average, and must be borne ratably by the cargo, the ship and the freight. In order to claim general average, the sacrifice must be voluntary for the benefit of all. The sacrifice must be made by the master or by his authority over property under his immediate control. The sacrifice must not be rendered necessary by any fault of the vessel.[34] If a sacrifice is rendered necessary by the fact that the vessel was not seaworthy, the vessel is not entitled to recover in general average.[35] So a deck cargo of a character not customarily carried on deck cannot claim the benefit of general average. The sacrifice must be successful. If the other interests in the ship are not benefited by the sacrifice, there are no grounds for general average. The sacrifice must be necessary. The master has a large discretion, however, as to what is necessary, and in the absence of any suggestion of fraud, the courts go far to uphold his discretion.[36]

34. **Marine insurance.**—Contracts of marine insurance were originally held in England to be not

[34] Ralli v. Troop, 157 U. S. 386.
[35] The Caledonia, 157 U. S. 124.
[36] Lawrence v. Minturn, 17 How. 100 (U. S.).

within the admiralty jurisdiction on the ground that they were contracts made on land, and it was not definitely decided in this country that the admiralty courts had jurisdiction of contracts of marine insurance until the decision of the United States Supreme Court in the case of the New England Insurance Co. v. Dunham.[37] Preliminary contracts for insurance, or suits to reform a contract that is not in accordance with the preliminary contract of insurance, are not maritime. The admiralty has no jurisdiction of such suits. A party cannot effect marine insurance unless he is so situated that he expects pecuniary benefit from the safety of the vessel or cargo, or pecuniary loss from its injury or destruction. Insurance on a vessel "lost or not lost" is valid, even if it turns out that when effected the vessel was a total loss.[38] In an application for insurance, any misrepresentation or concealment of a material fact will avoid the policy. The rule is very strict in this respect. Every material fact known to the insured must be disclosed.[39] There is an implied condition that the vessel is seaworthy.[40] Deviation on the voyage avoids the policy. It is not a deviation to delay or go out of the vessel's way to save life, but it is a deviation to do so to save property.[41]

35. **Total and partial loss.**—A loss under an insurance policy may be total or partial. A total loss may be actual or constructive. An actual total loss

[37] 11 Wall. 1 (U. S.).
[38] Hooper v. Robinson, 98 U. S. 528.
[39] Sun, etc., Co. v. Ocean Co., 107 U. S. 485.
[40] Richelieu, etc., Co. v. Boston, etc., Co., 136 U. S. 408.
[41] Saramanga v. Stamp, 4 C. P. Div. 316 (Eng.).

is when the subject matter is wholly destroyed. A constructive total loss occurs, under the English rule, when the vessel is so badly injured that she is not worth the cost of repair.[42] Under the American rule, the test is whether the cost of repair will exceed one-half her value when repaired.[43] In the case of a total loss, either actual or constructive, the vessel may be abandoned to the insured, and the whole insurance claimed. As a general rule, the valuation fixed in the policy of insurance is binding upon both parties, although it may differ from the actual value. The underwriter is subrogated to the rights of the insured upon payment of the loss.

36. **Salvage.**—Salvage is the reward allowed for a service rendered to marine property in danger by those under no legal obligation to render it. Salvage is peculiarly maritime in its nature. It has no analogy in any other branch of law. At common law, services voluntarily rendered in saving property in danger, however valuable in the result, imposed no legal liability upon the owner of the property to compensate the person rendering such service; but such service rendered to marine property in danger, without any contract, and without the knowledge of the owner of the property, creates a legal liability to compensation. The service must be rendered by those under no legal obligation to render it. Hence, usually the crew of a disabled vessel cannot claim salvage, nor her pilot, nor a passenger, nor the tug towing her, nor a life-saving crew.

[42] Barker v. Jansen, L. R. 3 C. P. 303 (Eng.).
[43] Bradlie v. Maryland Ins. Co., 12 Pet. 378 (U. S.).

37. **The salvage award.**—The award for salvage consists of two elements: compensation for actual outlay and expenses, and an award allowed from motives of public policy to encourage extraordinary exertions for saving life and property at sea. Special awards are given to those most competent to render service. The fact that little time is occupied not only is not a ground for diminishing the award, but is a ground for increasing it, as promptness in such cases is especially desirable. Special favor is shown steamers especially equipped for salvage service.[44] The elements on which salvage is usually computed are the degree of danger from which the lives or property are rescued, the value of the property saved, the danger to which the vessel and the lives of the salvors have been exposed, the skill shown in the service, the time and labor occupied, and the degree of success achieved. The largest awards have been given when life was at stake,[45] but as a salvage lien adheres to the property saved, there can be no such lien if there is no property saved. Therefore there is no such lien when life only is saved. But when property is saved, the lien for saving life as well as property attaches. Formerly courts paid little attention to salvage contracts. It was assumed that they had been extorted from parties under the stress of impending danger. At the present time a salvage contract usually will be enforced unless the circumstances indicate that an unfair advantage was taken of the helpless condition of the vessel in danger.[46] If the master of a vessel

[44] The Glengyle (1898), Prob. Div. 97 (Eng.).
[45] The Akaba, 54 Fed. 197.
[46] The Elfrida, 172 U. S. 186.

objects to assistance being rendered, ordinarily no claim for salvage may arise. The admiralty has jurisdiction of suits for salvage in rem, fixing salvage awards liberally on grounds of public policy.

38. **Collisions.**—Collisions are the most frequent subjects of litigation of all marine torts. Prior to the passage of the English statute in 1863, and the American statute in 1864, prescribing the rules of ocean navigation, there was little specific law upon the subject of navigation. In 1889, representatives of the leading maritime nations met in Washington and elaborated a code of navigation, which, in 1890, Congress enacted into law. These rules apply to the high seas. In 1897, Congress passed an Act making them applicable to all harbors, rivers, and inland waters, except the Great Lakes, the Red River of the North, and the waters emptying into the Gulf of Mexico. Navigation on the Mississippi and its tributaries and the Red River of the North is governed still by the old rules, found in § 4233 of the United States Revised Statutes, and the pilot rules for western rivers. The general scheme of the International and Inland Rules is the same, with some differences.

39. **Principles governing the rule of the road at sea.**—Two great underlying principles govern the rule of the road at sea. First, that the less manageable kind of vessel is privileged, and the more manageable is bound to avoid her. Thus, steamers must keep out of the way of sailing vessels, moving vessels out of the way of anchored vessels, and sailing vessels with a free wind must avoid sailing vessels close hauled. Second, under ordinary circumstances the

rule of the road at sea is the same as on land in this country, that is, each vessel shall pass to the right.

40. **Damages in collision cases.**—A collision may happen without fault or from the fault of one party or from the fault of both parties. When without fault, damages must be borne by the party who suffers them. When both parties are to blame, the loss must be divided between them. When the party suffering is guilty of fault, the sufferer must bear his own burden. Where the ship that is injured is free from fault, and the ship which came into collision with it is at fault, the latter must compensate the former. When both parties to a collision are at fault, the damages are equally divided, irrespective of the degree of fault.[47] There is a sharp distinction between the common law and the admiralty law in this respect. The common law rule is that if both are at fault neither can recover. The admiralty law is that if both are at fault the damage shall be brought into hotchpotch and divided between the two.

41. **Suits in admiralty.**—Suits in admiralty are either suits in rem or in personam. Both are begun by a libel. Suits in rem are based on a maritime lien. The vessel is seized. No notice is served on the owner. The law presumes that the seizure will give notice. The owner or any party interested files a claim and subsequently answers. Judgments in suits in rem bind the world. In suits in personam a monition is issued, and served on the respondent. In proper cases, by order of the court, it may be accompanied by a foreign attachment, or a warrant of arrest.

[47] The Woodrop, 2 Dod. 83 (Eng.).

42. **Practice in admiralty.**—The practice in admiralty is largely governed by the admiralty rules of practice issued by the United States Supreme Court, and by the special rules established in each district. Pleadings in admiralty are very liberal. They consist of a libel drawn substantially like a declaration or complaint at law, to which amendments are liberally allowed. The defense is set up by an answer or by exceptions to the libel, in the nature of a demurrer. In suits in rem, the process is served on the ship and a keeper put in charge. A bond may be given by the owner for the amount of the claim, and the vessel released. A vessel cannot be seized in admiralty if already in the custody of a state court. Admiralty trials take place before a judge without a jury, with the exception of admiralty cases arising on the Great Lakes, in respect to which there is an act of Congress authorizing a trial by jury on the demand of either party. The evidence is sometimes taken out of court, and sometimes orally in court. In the case of a decision for the libelant for unliquidated damages, there is usually a reference to a commissioner to fix the damages. The admiralty is not necessarily bound by Statutes of Limitations, but usually follows such statutes, and relief is often denied to stale claims. Costs are discretionary in admiralty. Appeals in admiralty are taken from the District Court to the Circuit Court of Appeals in the circuit in which the district is situated. At the present time usually such cases are not appealable to the United States Supreme Court unless special leave is given.

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MEDICAL JURISPRUDENCE

BY

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CHAPTER I.

INTRODUCTION—GENERAL PRINCIPLES.

1. **Medical jurisprudence defined.**—Medical jurisprudence may be defined as the science of applying medical knowledge to legal problems. It is wide in its scope, and includes nearly the entire range of human relationships. The definition given comprehends the following classes of questions:

1. Those relating to the time or cause of conception, birth and death;
2. Those relating to physical or mental disease or injury;
3. Those arising out of the relations of sex;
4. Those arising from deceptive practices—such as feigned diseases;
5. Those connected with miscellaneous questions, such as identity, presumption of survivorship, etc.

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2. **Medical experts.**—The most frequent calls upon physicians as witnesses in court are for expert testimony. This expert testimony, which falls under the head of opinion evidence, is obtained by the use of what are known as hypothetical questions. These first state the salient facts already brought out by other witnesses, and then ask the physician's opinion in the light of those facts. In answering hypothetical, as well as other questions, the physician should use the simplest words possible, in plain English; should wait until the question is fully stated before beginning his answer; should answer only the question asked; and should not argue with the attorney trying the case. If a question is asked in the alternative, and an unqualified answer demanded, a statement to the judge that the question cannot be answered properly in its form as asked will generally result in its being broken up.

In general, it may be said that a subpœna should always be obeyed, as failure so to obey may involve the physician in proceedings for contempt of court, with very disagreeable results. The physician should remember that it is his duty, just as it is the duty of every citizen, to aid the court in its administration of justice, so far as lies in his power. But, while it is his duty to attend when subpœnaed and testify when called upon, yet he may be limited in the testimony he gives, especially when called as an ordinary, rather than as an expert, witness. The old rule of the common law obliged the physician to give in evidence any communication made to him by his patient, if called upon to do so. This was particularly appli-

cable to communications made to him by his patient while under his professional treatment. But this rule of the common law has been changed by statute in many of the jurisdictions of this country; and in Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington, West Virginia, Wisconsin, Wyoming and the United States Courts, physicians either are not allowed or not compelled to testify as to communications made to them by their patients, unless the communications referred to some crime, or unless the patient has himself testified to the same matter, or in some other unequivocal fashion waived his right to have the physician's lips closed.

These are known as "privileged communications," the privilege belonging to the patient, however, and not to the physician. It is doubtful whether the privilege may be waived after the patient's death, even by his next of kin. Of course, in those jurisdictions where the common law has not been changed by statute, the privilege does not exist, and the physician may be compelled to testify. Where it does exist, the privilege runs not only as to the attending physician, but also as to his partners, if any. The privilege extends not only to verbal and written communications, but also to such knowledge or information concerning the patient which the trained eye of the physician may discover.

3. **Compensation.**—The compensation which a physician is entitled to receive as a witness, is usually regulated by statute. In some states, only the ordinary witness fee is provided by statute, as part of the costs of the case; in others, a larger sum, in recognition of the expert character of the testimony, is allowed as part of the costs. Where only the ordinary witness fee is allowed, not infrequently an additional fee is agreed upon, to be paid by the party calling the witness.

The compensation which the physician may receive for his professional services may be a matter of contract, or it may be a matter of custom. For the ordinary services of a physician, he may charge, and is entitled to receive, the usual rate per visit charged by reputable physicians in that community. The physician is the judge of the number of visits required by his patients, and when they may safely be discontinued. Where the physician attends in the capacity of a friend of the patient or the family, it is held he may not charge for his visits; but otherwise he is entitled to the usual charge for like services in that community. A wife has implied authority to bind her husband for reasonably necessary medical care and treatment, unless she has voluntarily left home without cause on the part of the husband, and similarly, a father may be bound for the necessary care and attendance rendered a minor child, or an unmarried daughter living at home and a part of the family.

One may also become liable for a physician's services for some person not a member of his family, if

he contracts so to do; but the contract must be express in order to bind him. For instance, if A says to a physician: "Attend B, and I will pay you," this is an express agreement which will bind A; it is his own obligation. But if he says: "Attend B, and if he does not pay you I will," this is not A's own obligation, but is simply his agreement to answer for the debt of another, and by statute in most states must be in writing to bind A. When a passenger or employee has been injured in a railway accident, or taken sick on the road, the company will be liable, especially in the former case, for medical services obtained for the emergency; but the physician must be called by one having authority, such as the train conductor or someone higher in authority, and even then the company will only be bound, generally, for one or two visits, but not for long-continued treatment. The courts are not in accord as to whether or not the general superintendent has authority to bind the company for a long-continued course of treatment of a passenger or employee; but it is thought the weight of authority would sustain such a contract.

4. **Relation of physician and patient.**—Ordinarily, a physician is not legally bound to attend a patient when called, but if he does undertake to attend, he must continue his visits until either: (1) the patient has recovered (or died); or (2) has had a reasonable time to secure another physician; or (3) the patient's regular physician has returned and taken charge. What will be a reasonable notice to get another physician depends upon circumstances. In a large city, with physicians numerous and tele-

phones common, a much shorter time—probably a few hours—would be considered reasonable time, while in a sparsely settled community where doctors were scarce, or means of communication slow, reason might require a day or even more.

As he occupies a position of confidence and trust with his patient, the law will not permit the physician unduly to influence the patient in the physician's own interest. Therefore, a devise to a physician by his patient, or transactions between them whereby the physician gains valuable property from the patient will be carefully scrutinized by the courts. If the devise or transfer is attacked or its validity questioned, the physician will have the burden of proving the devise was not made under, or by reason of, his influence over the patient; and that the transfer was made only after the patient was fully informed of all the material facts in the matter, and then acted wholly of his own free will. So, too, where a physician took with him a friend, not a doctor, to a confinement case, telling the patient's husband that he had brought a friend to help carry his things; the patient and her husband were held to have a right to assume that the stranger was a physician, and for the deceit practiced both the physician and his unprofessional friend were made to respond in damages.

5. **Dying declarations.**—These are statements made by one injured, when dissolution is impending, without expectation or rational hope of recovery, concerning the cause of his death. They are usually confined to criminal matters. If the medical man is present at or just before death, and the patient makes a

statement of this sort, it should be taken down *in the very words spoken,* and if possible it should be signed by the dying person, the physician and at least one other, if present, adding their signatures as witnesses. If time and circumstances permit, it should be read aloud to the declarant before he signs it; and should be sworn to, if possible. It is the physician's duty to explain to the patient the fact of impending death and the importance of the statement, but the declaration should be voluntary and not forced. The physician will, of course, satisfy himself of the mental soundness and alertness of the patient.

6. **Coroners.**—It is the duty of the coroner to inquire into and find the probable cause of unexplained cases of sudden or violent death. He may summon a jury to make a finding of facts upon the question, or he may make such finding himself, depending upon the statutory requirements of his state. He may issue subpœnas for witnesses, which writs must be obeyed just as though issued from the highest court. Where the statute does not require that the coroner be himself a physician, he has authority to employ one to aid in his investigations, and to bind the county to payment for such services.

7. **Feigned diseases.**—The practice of malingering, or feigning some disease or injury, is not at all uncommon. The object varies: to avoid jury duty, service in army or navy, or as a witness; or it may be for personal gain, as in a civil suit for damages; or for blackmail or to escape punishment, for which latter purposes women sometimes pretend pregnancy, or even delivery of a child. Generally, a care-

ful, competent physician should have little trouble in determining the fraud, although the advantages are often on the side of the malingerer.

Where one is suspected of malingering, several examinations and continued observations should be made, at different times and hours; and, if possible, without previous warning to the patient. If taken off his guard, the impostor can, of course, be readily exposed; and unless he is very skilled, he is likely to overdo his part, and will seldom get the various stages of his alleged disease in the proper sequence. The examiner's opinion must be based, as a rule, upon a comparison of the injury or accident with the resulting malady claimed, rather than upon any positive knowledge that the patient is shamming; that is, he will have to determine and largely base his report upon: (1) whether or not the injury might reasonably produce the conditions claimed; (2) whether or not the objective symptoms correspond to the conditions claimed; (3) whether or not the subjective symptoms—pain or disability—correspond to the conditions claimed; (4) whether or not the objective and subjective symptoms correspond; (5) whether or not the conditions claimed and the subjective symptoms are well defined, regular, and localized.

By subjective symptoms are meant those existing within the feelings and sensibilities of the patient; such as pain, aches, impaired vision or hearing, or inability to control muscles. By objective symptoms are meant those outside the feelings of the patient, which will be readily observed by the trained eye; such as bruises, wounds, or the change in color and

appearance of the female breasts due to pregnancy. It is thus readily seen that many objective symptoms —bruises, fractures, or the like—will be closely related to such subjective symptoms as aches or pains. This relationship is well understood, and forms an important part in the physician's diagnosis of the patient's malady.

8. **Presumption of survivorship.**—Not infrequently, when members of the same family perish in the same calamity, it becomes necessary to determine which died first, in order to determine the further question of inheritance. If there is no positive evidence as to which one was last alive, in some jurisdictions the law presumes that the physically stronger survived the weaker; as, that an adult man will survive an adult woman of about the same age, that an adult will survive a child, and that one of middle age or youth will survive an elderly or aged person. But in many states the law indulges no presumption in the matter, leaving the question to be determined from such evidence as may be produced, if any.

CHAPTER II.

MALPRACTICE.

9. **Malpractice.**—Malpractice may be defined as bad, or unskillful practice on the part of the physician or surgeon. It is usually classified as willful, negligent, and ignorant; and also as civil and criminal, although some states make no provision by statute for criminal malpractice, as such, only punishing it as incidental to some larger offense, as the procuring of an abortion.

Civil malpractice gives rise to a right of action by the patient against the physician for carelessness in the performance of his duties in treating the patient's malady. The gist of the action is negligence even though the bad practice is due to ignorance on the part of the physician. The obligation of one who holds himself out as a physician or surgeon is that he will exercise in his employment the average degree of care, skill and diligence exercised by members of the same profession and of the same school of medicine, practicing in the same or a similar locality, in the light of the then state of medical and surgical science; and that he will indemnify the patient against any injurious consequences which may result from his failure to use such average degree of care, skill and diligence. And if one holds himself out as a specialist, he will be held to the average degree of care, skill and diligence of like specialists in the same

or a similar community. Thus, a general practitioner in a populous community, who undertakes to perform a surgical operation, will be held to the average degree of care, skill and diligence of surgeons in that or a similar community; and though he use *his* best skill and knowledge, yet if he fall below the average of surgeons, he will be liable for injurious results. But one in a sparsely settled district, a long distance from centers of population, who uses *his* best care and skill in a necessary surgical operation, will not be made to respond in damages, even though he fall below the average degree of care and skill of the city surgeon.

While a medical man is held responsible for injuries resulting from his negligence, ignorance, or willfulness, yet for honest error of judgment he will not be liable. But it must be really a mistake of judgment, about a matter which is more or less unsettled by his school of medicine. If he discards the settled practice or remedies of his school of medicine, and employs those of another school, he will be held liable for injurious results.

The fact that the services are rendered gratuitously has no bearing upon the matter. In no way does the fact that the patient is unable or unwilling to pay, diminish the physician's obligation as to care, skill, and diligence.

The physician has done his duty and fulfilled his obligation to the patient when he uses the care and skill above mentioned; but he does not guarantee a cure, unless, of course, he has expressly contracted to effect a cure. In such a case, he will be liable for

damages for breach of contract if he does not bring about the cure contracted for, although he may have used the full degree of care, skill and diligence which the law demands of him in the absence of any contract.

If the patient neglects or refuses to follow the physician's prescribed treatment, and it can be shown that such neglect or refusal by the patient has at all contributed to his injured condition, the physician's liability for damages, whether the action is in tort or in contract, is mitigated *pro tanto* (for so much) in some jurisdictions, and in many states he is entirely relieved by reason of such contributory negligence by the patient.

What has been said applies to women practitioners as well as to men; and the same general rules concerning malpractice apply to dentists as well as to physicians and surgeons.

CHAPTER III.

IDENTIFICATIONS.

10. **Of the living.**—Ordinarily the identity of living persons may be established without any difficulty by friends and relatives. Instances have occurred, however, where even the closest relatives and friends have been deluded by impostors, as in the famous Tichborne case. Peculiarities of speech, voice, or actions; birthmarks; unusual traits; size, and similar tests may aid in identification of the living. It should be borne in mind, however, that a long lapse of time may more or less obliterate birthmarks, moles, poorly-executed tattooing, and other marks. But a large scar is permanent, although the passage of time may make it somewhat less prominent.

11. **Of the dead.**—Where the entire body is at hand and decomposition has not proceeded far, the same means of identification as in case of the living would be available, except, of course, the voice and actions. But where only a portion of the body is found, the difficulty is considerably increased. If the head is found, the task will probably not be very hard; but frequently only an arm, a leg, or a portion of the trunk is found, and in such case, although positive identification may not be possible, yet such a portion of the body, together with scars, deformities, and any professional stigmata (marks) present, will generally reveal to an expert the sex,

approximate age, race, and perhaps the trade or calling, and social position, of the deceased.

12. **Of bones.**—If an entire skeleton be had, the height may readily be found, and the sex determined without trouble except in the case of young children. The bones of the female are smaller than those of the male; and after puberty the pelvic bones exhibit marked differences: in the male the pelvis being deeper and narrower, and the bones thicker, than in the female.

Usually, too, the approximate age may readily be ascertained from the skeleton. Indeed, if but a few bones are available it is probable that the general period of life, as youth, middle or old age, may be determined. Age can probably be better ascertained from an examination of the teeth and alveolar processes (cavities in the jaw bones containing the sockets for the teeth) than from any other bones; still, from the degree of ossification (bone formation) and union of other bones a fairly approximate idea of the age may be had. When only a few bones are found, the first question, of course, will be: Are they human bones? If yes, then the further questions looking toward identity will arise.

13. **Of hairs and fibres.**—Here, again, the first question will be: Is the substance human hair, or not? Generally, animal hair is shorter, thicker and coarser than human hair, and can readily be distinguished therefrom. A microscopical examination will distinguish, without much trouble, hairs from fibres, and the different kinds of hair.

If the hair is found to be human, it may be neces-

sary to determine the portion of the body from which it came. If only a single hair be available this will likely be difficult to decide. Hairs from the eyebrows are firm, the bulb being stout and knob-like; from the eyelashes, much the same, but with spindle-shaped roots; from the nose and ears, coarser than the eyelashes, with stout roots; from the beard, a transverse section shows them to be triangular; from the armpit, non-tapering, with conical but not sharp points, with the shape modified, frequently, by perspiration; from the pubis, oval and flattened, and in the male the roots are generally knotty, but broad in the female. The identity of hairs, as to either assailant or victim, cannot be determined unless there be present a number sufficient for thorough examination; several, at least.

14. **Of bloodstains.**—Once more the first question must be: Is this stain from blood, or not? If yes, then: Is it human blood? If yes, then : Is it arterial, venous, or menstrual? from the living or the dead?

Whether or not the stain is blood may be determined by chemical tests. There are several of these, but no one of them is absolutely certain. In order to employ the chemical tests, there should be present more than a minute particle of the stain—there should be enough to permit portions to be used in various ways, and perhaps with different chemicals. If the stain be blood, its red coloring matter will be dissolved by cold water; and the addition of a little ammonia, much diluted, will turn this solution green. If strong solution of ammonia is used, the resulting color will be brown.

The spectroscopic test is often used when there is but a small quantity of the stain. By it, light is passed through a solution of the stain, which, if caused by blood recently oxidized, will produce dark bands (called absorption bands) characteristic of the presence of blood even in very small quantities. This test, in skilled hands, is considered very accurate. It is claimed that by its use blood has been found, after ten years, on a rusty knife-blade, although after so long exposure to air the color bands will be much less distinct, and produced only by use of chemical solutions.

The microscopic test is used for detecting blood corpuscles, and in measuring them. In this way may be distinguished the blood of birds, reptiles, fishes, and mammalians; but although tables have been worked out, from experiments and very exact measurements, showing the size of the red corpuscles of a large number of animals, yet it is not possible by this test to state positively that certain blood is from a human being rather than from any of several other animals.

The biologic or serum test has been accepted in some European countries, and in some instances in this country, although, perhaps, it is not free from reasonable doubt. By this test human blood serum (the clear, light yellow liquid that separates from the blood clot) is injected into some animal of a different species, as a rabbit; and it is claimed that after a few days that rabbit develops a serum which will precipitate human blood, but not that of any other animal. High claims are made for its accuracy, and this test

has many able advocates, but as yet it is not fully accepted.

To determine whether blood is venous, arterial, or menstrual, is impossible unless it was recently discharged. It would be seldom, if ever, that any murderous wound could be inflicted, causing much bleeding, where the venous and arterial blood would not be mixed. Menstrual blood, once thought to have no fibrin (that quality of the blood which tends to produce clotting or coagulation), and thereby distinguishable from other human blood, is now known to contain fibrin, though it seldom coagulates.

CHAPTER IV.

DEATH AND ITS SIGNS.

15. **Death.**—Death, or the cessation of life, is either *somatic,* or the death of the body as a whole; or *molecular,* or the death of a part, that is, some organ or tissue, of the body. Molecular death, when complete, as when it has progressed until the entire organism has lost its vital force, is the true scientific death; but somatic death is the popular idea of death, or dissolution, and means the complete cessation of the vital functions. It is recognized, usually, by the stoppage of circulation and respiration. But even after somatic death has taken place, some molecular life may continue. This is evidenced by the rise in temperature of the body which frequently follows somatic death; by growth of nails and hair after burial; and instances are even recorded of the post-mortem action of the heart, and of secretion and nutrition.

16. **Signs of death.**—There are a number of signs, varying in importance, by which to determine death.

(1) Cessation of circulation and respiration. These systems do not necessarily cease functioning at the same time. The heart may beat, noticeably, for several minutes after breathing has ceased, as seen in death by asphyxiation. Mere absence of pulsation at the wrist is not a sure sign of death. The use of the stethoscope to hear the heart beats; putting a lig-

ature about one of the fingers, when, if it has not ceased circulating, the blood will be stopped in its return; opening a vein or small artery to determine coagulation, or clotting, and arterial bleeding, respectively, are means frequently used to learn whether heart action has ceased or not.

To determine respiration, a highly polished, cold surface, as a mirror, is held over the nose and mouth: moisture condensed on the mirror would show respiration. So, too, a feather suspended near the mouth, and moving, indicates respiration. If a glass of water or mercury be placed on the naked chest, the liquid surface will be disturbed by the slightest motion. But all these tests are positive merely; that is, although moisture on the looking-glass, and motion of the feather or liquid, will show that respiration still exists and life is not yet extinct, the absence of such moisture or motions does not conclusively prove that respiration and life have ceased. For a short time respiration may be imperceptible, and life remain. But an entire and continuous cessation of respiration, as shown by the tests named, would indicate death.

(2) Insensibility in the cornea is also produced by death, but as the same condition may be brought on by certain brain injuries, or by some of the poisons, this is not a very strong proof of death.

(3) The normal temperature of the body will be changed by death. An increase of temperature may occur immediately following dissolution, and this is frequently the case when death has occurred from yellow fever, smallpox, tetanus (lockjaw), cholera,

etc., and such an increase of temperature is sometimes caused by molecular life after somatic death.

The rapidity of the cooling of the body in any given case depends so much upon the circumstances, and upon so many, that it is impossible to give an accurate rule. The temperature of the body will never be reduced below that of the surrounding medium. Thin bodies and those more or less wasted by long illness will cool more rapidly than fat ones; those of children and elderly people lose heat quicker than those of middle age. Cooling is prolonged by clothing upon the body, keeping it in a small, close room, or keeping it upon non-conducting material. A general approximation indicates that for the first three or four hours after death the body loses heat at the rate of about four degrees Fahrenheit per hour.

(4) Death pallor, or an ashy color, usually overspreads the entire body after dissolution. But this cannot be taken as a positive sign of death, as it occasionally does not occur; and it may also be found, or at least closely simulated, under other circumstances. such as fainting and collapse.

(5) Rigor mortis is a positive sign of death. It consists of a stiffening of the muscles, due to coagulation of a part of the muscular tissue somewhat resembling the albumen or white of an egg, and generally is complete in six or eight hours after death; although this cannot be taken as a rule for every case, as the time of setting in of rigor mortis varies, depending upon the cause of death, and upon the individual's condition. It continues for varying periods, usually from

sixteen to twenty-four hours, and disappears when putrefaction sets in. It must not be confused with *cadaveric spasm,* or that involuntary contraction of the muscles which, closely resembling rigor mortis, occurs frequently in those who have died a violent death as by suicide. Rigor mortis has a very definite progression, the muscles of the eye being first attacked, then those of the jaw and neck, and passing down to the chest, arms, abdomen and lower extremities, in order. It passes away in the same order.

(6) Cadaveric lividity, or suggillation, or cadaveric ecchymosis, as it is variously called, is the appearance of certain livid or violet-colored patches on the body, and within it as well, usually noticed in from twelve to fifteen hours after death. It is due to the settling of the blood after life has ceased.

(7) Putrefaction ordinarily follows death, and is a positive sign of dissolution. It follows rigor mortis, setting in at periods varying from a few hours to three days after death. A greenish discoloration first appears on the abdomen, whence it gradually spreads to the rest of the body. Internally, the larynx and trachea show the first signs of decomposition; then, in the case of young children, the brain; the stomach, intestines, spleen and liver, in order; next the brain, in the case of adults; the heart, lungs, kidneys, bladder, gullet, the diaphragm and arteries; last, the uterus, the toughest organ of the body, and which has been known to resist putrefaction for seven months or more. As the uterus is an organ which often receives medico-legal investigation, its ability to resist decomposition is a fact of especial importance.

In some cases the body does not putrefy, but becomes mummified, and dried up. This can only take place when it is exposed to dry air, and protected from moisture.

(8) Adipocere is a soapy substance, into which the soft parts of the body are sometimes converted under certain conditions, and is a modification of the putrefying process. Its formation is favored by complete immersion of the dead body in running water, or burial in cess-pool soil. When saponification (turning into a soapy substance) is complete the body may remain for many years without further decay, and the various organs be readily identified.

(9) The time which has elapsed since death is frequently of great importance to ascertain. If the dead body alone be the basis of calculation, then only an approximation of the time of death can be made. If the body is only slightly cold, with eyes glazed and jaws somewhat rigid, death probably took place from fifteen minutes to four hours previously. But if entire rigidity and cooling throughout be present, death occurred from twelve to fifteen hours to three or four days before. Cadaveric lividity would indicate that death occurred from one to four days previously. If rigor mortis has passed off, and putrefaction set in, from one to three days in summer, and from three to six or eight days in winter, have probably elapsed since death. The state of digestion of food found in the stomach may be of great aid in determining the question.

CHAPTER V.

MODES OF DEATH.

17. **Syncope.**—Syncope, or death beginning at the heart, is due to anemia, where the heart-power is strong, but the blood supply is deficient; or to asthenia, where the heart-power is deficient, but there is no lack of blood. In death from syncope proper, a combination of asthenia and anemia is present. Sudden death from shock probably results from syncope. The general post-mortem appearances which follow death from syncope show that both sides of the heart contain equal amounts of blood; and the brain, lungs, and capillary system generally appear normal.

18. **Coma.**—Coma, or death beginning at the brain, is marked by more or less profound stupor; by gradually increasing loss of consciousness and sensibility; the breathing heavy, irregular, and slow. The post-mortem shows the right side of the heart and lungs fairly filled, but the left side empty. Frequently, too, effusions (unusual quantities of blood) will be found in the head.

19. **Asphyxia.**—Asphyxia, or death beginning at the lungs, is indicated by intense struggles to breathe, followed by dizziness, loss of consciousness, spasms, and death. The right side of the heart, the veins, etc., will be found engorged with blood, very dark in color; while the left side of the heart and the arteries will practically be empty. Not infrequently these

three forms of death may be combined, and it is then difficult, if not impossible, to say which predominates.

The usual forms of death from asphyxiation are best known as suffocation, strangulation, hanging, and drowning.

20. **Suffocation.**—Suffocation takes place when the proper supply of pure air is kept from the lungs, but does not include the other three forms just mentioned. It may be due to the deterioration of the air supply, as when it is heavily laden with noxious gases; or to the closing of the air passages in the throat, either by disease or by the entrance of foreign bodies; or to the closing of the mouth and nose externally. This latter is known frequently as smothering.

Foreign bodies may be placed in the throat intentionally. Suicide and homicide from such cause, however, are infrequent except in the case of destruction of new-born infants. But accidental death from this cause is common, often occurring during eating. Closure of the mouth and nose is rarely, if ever, a means of suicide. Homicide not infrequently occurs in this manner, often in cases of infanticide; and in many instances where murder is not intended, but the mouth and nose of the victim are forcibly closed to prevent outcries. Death also results from the accidental closing of the mouth and nose, as where a bank or mine caves in, or where one who is unable to help himself, as an infant, or one drunk or paralyzed, becomes entangled in bedclothing. In any form of suffocation the usual post-mortem appearances of asphyxiation are present.

21. **Strangulation.**—Strangulation is due, usually, to shutting off the air supply by strictures about the neck. These may be by a band or cord, by pressure of the hand or fingers, or by any other mechanical means. It is a frequent means of homicide, but is rarely used with suicidal intent. Seldom is it possible for strangulation to take place without leaving upon the neck marks of the fingers, cord, cloth or other instrument used to produce death. When accompanied by great violence, the face may be almost black; the tongue protruding; genitals swollen; and involuntary escape of fecal matter and urine may result. If strangulation is the cause of death, the superficial air-vessels of the lungs will be ruptured; this is the safest test to apply in determining whether the strangulation was ante-mortem or post-mortem.

22. **Hanging.**—Hanging may cause death either by asphyxia or by dislocating the spinal cord and column. When it produces asphyxia, it means that form of strangulation in which the pressure upon the neck is caused by the weight of the body suspended from the constricting cord, or band. Where the hanging is a judicial execution, the body is suddenly dropped several feet, and death is ordinarily due to the breaking of the spinal cord. In cases of suicide by hanging, the suspension of the body will usually be gradual, and death results from asphyxia. In hanging, the external marks of the cord upon the neck are oblique, instead of horizontal, as in strangulation. These marks may be made by a post-mortem hanging; but if signs of saliva appear straight down the neck and breast, death was due to hanging, as the

discharge of saliva is a living process. The usual post-mortem appearances of violent death are present, but the superficial swelling of the lungs with air or gas, known as emphysema, is usually absent.

23. **Drowning.**—Drowning is that form of asphyxiation due to interference with the air supply by some liquid. Drowning may take place in a comparatively small quantity of the fluid, sufficient merely to stop the air passages. Thus, where one who is drunk or attacked by sudden dizziness falls face down in a few inches of water, as in a shallow brook, ditch or gutter, death from drowning may readily ensue if the person is not rescued.

Where the victim has been suddenly immersed in water, involuntary inspiration takes place and water is taken into the lungs and usually some is swallowed. This will produce asphyxia to some extent, which will become complete if one or two more attempts at respiration follow.

If the body has been placed in water after death, little or no water will be found in the lungs, or in the stomach. This will be an important factor in determining whether death was due to drowning or not. Homicidal drowning, except in the case of young infants, is rare; and if the body be that of a youth or adult, who was the victim of foul play, some evidences of a struggle before immersion in the water will usually be found. But care must be taken to distinguish evidences of a struggle from those marks of violence frequently resulting from a considerable fall before striking the water, which may produce bruises, dislocations, and even fractures.

The post-mortem appearances of a body submerged for a short time only will show the skin cold, contracted, covered with "goose-pimples." This latter condition of the skin, if there be also a fine froth from the nose and mouth, is almost conclusive of death by drowning; for they indicate that the body entered the water during life, and that vital processes took place during submersion. Rigor mortis sets in and disappears early when the body is submerged.

24. **Death from cold.**—This is usually due to accident, rather than design, although instances are not infrequent of new-born infants being killed by exposure, to which they yield very readily. The very aged are also very susceptible to cold; and wounded persons will have their dangers increased by exposure to cold.

25. **Death from heat.**—During the warm weather deaths frequently result from sunstroke. Dr. Ewell names three classes of cases falling under the term "sunstroke," viz.: (1) Acute meningitis or phrenitis, said to be very rare; (2) heat exhaustion with collapse, feeble but rapid pulse, skin cold and moist, and the general tendencies of syncope; (3) thermic fever (that caused by excessive heat), although this may be due to external artificial heat as well. There are no especially characteristic post-mortem appearances in death from heat. Rigor mortis comes on quickly, and decomposition rapidly follows.

26. **Death from electricity.**—Such an event may be due to shock, to the severe burns or wounds received, or to the destruction of some of the vital tissues. While there may be evidences of the lightning

stroke, such as burns, blisters, livid streaks, bruises, etc., they are not invariably met with in cases where death was instantaneous. So, too, where instant death occurred, rigor mortis frequently comes on at once, the body retaining the same position as when struck.

27. **Death from starvation.**—This may be either (1) chronic, where there is withheld food sufficient either as to quality or quantity to sustain life; or (2) acute, as where all food is withheld from a person previously well fed. Acute starvation is rarely due to design, but is usually the result of accident. Chronic starvation may be the result of disease, deprivation, or neglect on the part of those having charge of children or others somewhat helpless. The post-mortem appearances of starvation will show emaciation, absence of fat tissues, muscles soft, wasted and lacking tone, and the skin harsh and dry.

CHAPTER VI.

WOUNDS, BURNS AND SCALDS.

28. **Definition.**—A wound, from the medico-legal viewpoint, may be considered as any breach of any of the tissues of the body. It will be observed that this definition includes fractures of bones, as well as cuts or tears of the skin and flesh.

29. **Classification.**—Several different classifications are required, depending upon (1) the manner of producing the wound, (2) whether infection is present or not, and (3) the depth of the wound.

(1) As to mode of producing a wound, the classification is: (a) incised, generally called a cut, and brought about by some instrument with a thin or cutting edge; (b) punctured, usually caused by a sharp pointed instrument; (c) contused, where bruising is more or less present, and is generally occasioned by falls, blows, etc.; (d) lacerated, where the parts are torn rather than cut. This last might include gunshot wounds, although a separate class is sometimes given them.

(2) As to presence or absence of infection, wounds are: (a) clean, where there is no infection; (b) suppurating, where infection is present and pus is generated thereby; (c) poisoned, where poisonous matter is introduced at the time of injury, as by bites or stings of insects and snakes.

(3) As to depth: (a) superficial, where the injury is external; (b) penetrating, where the surface extent is much less than the depth; (c) perforating, a penetrating wound which cuts or breaks through some of the internal cavities of the body, as the stomach.

30. **Medico-legal consideration of wounds.**—This is for the purpose of determining: (1) whether the wound was the cause of death, (2) what instrument produced the wound, (3) whether it was made before or after death, (4) by whom it was made and with what intent: Was it self-inflicted or not? Was it suicidal, accidental, or homicidal?

Death can result from some one cause only. It is necessary, therefore, to negative all other possible causes before one can say positively that a wound, however severe, was *the* cause of the death. In the case of only one wound, and that one injuring some of the vital organs, there will be, perhaps, little difficulty; although even in such case the wound may be the indirect, rather than the direct cause of death. For instance, a kick or blow upon the abdomen, causing fecal matter to escape, an operation and cleaning of the cavity, followed by peritonitis and death: here death was the direct result of the peritonitis, but the wound was the indirect cause. The nature and extent of the wound, the part of the body on which it was inflicted, are all very essential considerations in fixing the cause of death. Thus, a penetrating wound, unless confined to the thick, fleshy parts, is more likely to cause death than a cutting, bruising, or tearing wound. But if the incised wound were in the throat or where it severed some of the large blood-

vessels it would prove very dangerous, and would quite likely cause death.

Some wounds, from their nature and location, will at once negative the probability of self-infliction. Thus, in suicide by shooting, the wound is rarely from behind, although it is possible. So, too, a fracture of the skull would be extremely improbable from a self-inflicted blow. Many wounds are of such a nature, however, as to afford no reliable indication of the manner of their production. It then becomes necessary to look to the surroundings for evidence. Indications of a struggle, such as torn or disordered clothing, a number of wounds, bruises, etc., would point strongly to homicide. Usually, if the victim is found grasping the fatal weapon tightly, it is an indication of suicide; but the fact of the pistol or dagger being found some distance from the victim is not necessarily inconsistent with suicide.

If the wound was made before death, more or less bleeding, with coagulation, will be found. If death did not occur for some time after the wound, the edges will have begun to draw together and the natural processes of repair will be seen; but this is not the case if death follows closely upon the wound. If the wound was inflicted after death, the hemorrhage will be slight (if any at all), and will consist of venous blood only. The edges of the wound will be gaping, and no processes of repair will be indicated.

31. **Burns and scalds.**—A burn is caused by dry heat applied to the body; a scald, by the application of hot liquids. The greater the surface extent of the burn over the body, the more serious it becomes. This

is also the case where the injury is from scald. It is hard to say, in many cases, just what was the cause of death. In large fires death may be due to asphyxia, to absence of oxygen, to breathing the flame into the lungs, to fright, or to shock resulting from extensive burns on the body.

After burns upon the body blisters will frequently form on the skin, and if serum is found therein, it is evidence that life was not extinct at the time of the burns. If the burns took place after death, a condition very similar to blister may be found, but instead of finding serum, the blister will contain air or gas. A redness about the burned portion, either a line or a patch more or less diffused, indicates that death was subsequent to the burning. It is important to remember that the bodies of victims of murder are frequently burned more or less extensively in order to cover up the crime. Where any suspicious circumstances are present, a careful examination of the body for wounds should be made, and the burned portion closely scrutinized for evidences of death having taken place before the burn.

CHAPTER VII.

PREGNANCY—DELIVERY—ABORTION.

32. **Signs of pregnancy.**—Whether or not pregnancy has occurred is of importance for the reason that it is sometimes feigned for the purpose of blackmail, gain, inheritance, or to avoid punishment. It may also be denied, although present. For the same reasons, and to prove maternity or criminal abortion, the fact and time of delivery of a woman may become important to ascertain.

There are no positive, absolute signs of pregnancy prior to quickening, which occurs about the fourth or fifth month; but the suppression of the menstrual flow, the presence of "morning sickness," nausea and vomiting, and change in the color of the skin around the nipples, especially if the woman was never before pregnant, are each suggestive; and if they are all present it is very probable that the woman has conceived. Their absence, however, while not usual, is not inconsistent with pregnancy.

After quickening, a positive diagnosis can generally be made. The breasts begin to enlarge, the abdomen becomes noticeably larger, and the movements of the child in the womb may be felt by the physician; and the trained ear may detect the heart-beats of the fœtus. At this stage, the physician's task is easy.

A child may be born at seven months after concep-

tion, and live; and, on the other hand, the pregnancy may be lengthened two or three weeks beyond the usual period, which is about two hundred and eighty days, or ten lunar months.

After death of the woman, if the question of her pregnancy arises, and decomposition has not proceeded far, the same external appearances will be found as in the living; and an examination of the uterus will of course show enlargement and change of shape, if pregnant.

33. **Signs of delivery.**—If delivery be at full term, the woman shows more or less weakness; the pulse is somewhat quickened and soft; skin soft and moist; eyes sunken, and countenance pallid. The breasts will usually be full, and milk may be pressed from them. The abdomen appears to have been recently stretched tightly and then relaxed, and lies in folds with little lines, or clefts, running across it in all directions. The vagina will be soft and dilated, with more or less mucus, and the uterus will also be very much dilated, and soft. A few hours after delivery, the "lochial discharge" from the vagina commences, consisting at first of pure blood, but gradually becoming watery and pale, and usually disappearing after three or four days. These are positive evidence that the woman has been delivered recently.

At the end of three or four weeks, usually, the only signs of delivery which remain are: the darkened color around the nipples, the white lines on the abdomen, the loose or relaxed skin of the abdomen, and such tears of the neck of the womb as delivery may

have caused. These are permanent, and their presence will indicate delivery at some time in the past; but how recently it would be impossible to say from these permanent signs alone.

When delivery occurs before full term, or if the child is very small, the signs of delivery will be much less apparent, the size and the development of the child having a direct bearing upon their prominence. Therefore, if the contents of the uterus be expelled during the first two or three months after conception, the signs of delivery will be slight and indistinct, especially if the woman had previously been pregnant.

34. **Abortion.**—Abortion, or miscarriage, in legal contemplation, is any expulsion of the contents of the uterus before the period of pregnancy is complete. It may be classified as: (1) Natural abortion, not brought on by outside interference; (2) artificial abortion, which should again be divided into: (a) justifiable, for the purpose of saving the life of the mother, and the child, too, if possible; and (b) criminal abortion.

In most, if not all, of the states of this country, artificial abortion is made a crime unless it was necessary, or considered by two or more physicians to be necessary, to save the mother's life. Where it was not justifiable, the woman herself is probably liable to prosecution for the crime, even though the abortion was produced by another.

If the abortion took place near the end of the period of gestation, the signs of recent delivery as set forth above will be important in settling the ques-

tion. But if, as is most frequent, the abortion be induced in the early stages of pregnancy, it will be almost impossible of detection, unless it were unskillfully done, in which case blood poisoning or puncture of the walls of the uterus may occur, which would be evidence of the criminal act. Of course, if death result, an autopsy would show whether the uterus had been pregnant, and it would also reveal evidences of any poisons which might have been administered as abortives.

CHAPTER VIII.

INFANTICIDE.

35. **Definition.**—By the term "infanticide" is meant the destruction of a new-born child. This means that the child must have been born alive; that is, must have been completely expelled from the mother's body, and have set up an independent existence by breathing. Infanticide is murder, just as is any other form of taking life unjustifiably; but owing to the fact that a large percentage of children are still-born, the usual presumption is that an infant whose dead body has been found was dead at the time of birth. Of course, this presumption is rebuttable by proof of live birth.

Investigation of suspected infanticide will usually require answers to the following questions: (1) Was the child mature, and capable of separate existence? (2) Was it the child of the prisoner, and has the prisoner been recently delivered? (3) Was the child born alive? (4) If so, what was the cause of its death?

(1) The maturity of the child can be readily determined by examination and measurements. The growth of the fœtus in the womb is marked by fairly defined stages, beginning with a length of the embryo of one and a half to two and a half inches at the second or third week after conception, and gradually increasing up to the fortieth week, when it should be fully

developed, and be from twenty to twenty-four inches in length, with a weight of about seven pounds on the average. If, at the lower end of the femur, the bone development known as the center of ossification be of the size of a pea, the child is fully formed; if larger than a pea, the child has lived after birth; if it be absent, not more than eight months can be ascribed as the life of the fœtus, as a rule; but negative evidences cannot always be relied upon.

(2) Whether or not the prisoner has recently been delivered will be determined by examination of her, as above outlined. If she was recently delivered, the question whether or not the child in question is hers will be answered by the surrounding circumstances, much weight being given to the comparative state of the alleged mother with that of the child. It will also be important in this connection to consider color, birthmarks, etc., of the child as resembling those of the prisoner, although these are not very reliable, in and of themselves alone.

(3) In considering whether or not the child was alive at birth, it must be remembered that many natural causes, and also violence not criminal, may bring about the death of the infant. Protracted labor, death of the mother before delivery, her congenital debility, some disease of her vital organs, or a very contracted pelvis, hemorrhage—these are all among the natural causes of death of an infant. So, too, if the mother were alone at delivery, and so weak that she could not care for the child, it might die from exposure, from smothering in the bedding, or drowning in the birth-fluids.

If the child has set up an independent, extra-uterine existence, the circulation of the blood will take a new course, and the umbilical vessels will be more or less obliterated; and if life continues for several days or a week or two, the umbilical cord will show corresponding stages of desiccation. If food be found in the stomach, it is certain the child has lived since birth. Perhaps the evidence of live birth most relied upon is the condition of the organs of respiration. If the infant is ordinarily mature and vigorous, a very few minutes of independent life will be sufficient for the lungs to become partially filled with air enough to establish the fact of natural breathing, and so of live birth. Before the lungs have air in them, they occupy a relatively small part of the chest; but after they have been expanded by breathing, their position is much more prominent, the pericardium (the membrane covering the heart) being nearly covered by them. But their best evidence of live birth lies, not in their volume while in the body, but in the various tests to which they may be subjected at post-mortem.

Lungs unaerated (not supplied or filled with air) are dense and solid, do not crackle when cut or pressed, will sink in water, and have little or no blood in them. They are dark in color. After respiration has been established, they feel spongy, the margins are less sharp than before the air enters, and they will crepitate when cut or handled. With respiration will have come circulation, and the color of the lungs is changed from a chocolate or liver hue to pinkish or rose red.

The hydrostatic test should begin by placing the heart, lungs, and thymus gland *en masse* (in a mass) in a vessel large enough to permit their free floating or sinking, the vessel being filled with river or rain water at about sixty degrees Fahrenheit. If all sink, it is proof that the lungs have not been completely expanded by air; if they have been so expanded they will be buoyant enough to float the whole mass. Unless the mass floats, the lungs should next be separated from the other organs and tried again, by themselves; then the lungs should be cut into small pieces, perhaps half an inch in diameter, and these pieces tested. The fragments should then be pressed tightly, and again tested. If they still float, it is proof that the child has breathed. The lungs may float even though not aerated, as when they are more or less filled with gas from putrefaction. This may easily be distinguished from air in the lungs by the fact that gas is more readily pressed out than is air, and has a putrid odor. The hydrostatic test is qualified in this, however: the infant may have lived for a time without breathing deeply enough to aerate the lungs, or a disease such as pneumonia may so far deprive the lungs of their buoyancy that they will sink. But such conditions as these will doubtless be indicated somewhat by the size and development of the child, evidences of disease, etc.

(4) In addition to the natural causes of death of an infant, above mentioned, it should be remembered that various diseases of the mother may cause death of the infant before birth; also, death may naturally occur from pressure on the umbilical cord, thus shutting off

the child's means of sustenance before it has set up an independent existence. In addition to asphyxia resulting from pressure on the cord, suffocation, strangulation, drowning, exposure, and wounds, are variously resorted to as means of death of the newborn child. It should be borne in mind, however, that death might result accidentally from any of these causes, as well as by design; although it is probable that the surrounding circumstances will strongly indicate whether or not death was the result of design, and the same considerations will apply in determining the cause of death of an infant as that of any other death under suspicious circumstances. Marks of violence, such as fracture of the skull, bruises, etc., due to design, are much greater in extent and severity, usually, than those due to normal causes, such as contracted pelvis, etc.; but occasionally it is hard to distinguish between them.

CHAPTER IX.

LEGITIMACY AND PATERNITY—RAPE.

36. **Legitimacy.**—A legitimate child is one born in lawful wedlock, or within a competent time thereafter unless it is proven: (1) that the married couple had no possibility of access within the reasonable period of gestation; (2) that the husband was impotent or sterile. Paternity being denied by the husband casts a doubt upon the presumption of legitimacy, although where the pregnancy was so far advanced at the time of marriage that the husband must have known of it, this will be deemed a recognition on his part of both paternity and legitimacy. In most states, too, the statutes provide that when a man marries a woman who has a bastard child, and he recognizes and treats such child as his own, this will legitimize the child.

(1) Possibility of access or otherwise will be determined by the ordinary rules of evidence, and so the matter will not concern the medical jurist except as it touches upon the question of gestation. This period is subject to some variation in different women, and not infrequently in the same woman: her first pregnancy often terminating at seven or eight months, while the others proceed to full term. But the usual period is nine calendar or ten lunar months, counting from the time of the last menstruation. In some European countries, maximum and minimum periods

of gestation have been fixed by statute: one hundred and eighty days being declared the shortest and three hundred days the longest gestatory period within which can be born a child capable of inheritance. But, though rare, apparently authentic cases have been reported of a period of three hundred and twelve days; and in most, if not all, of the jurisdictions of this country each case would be determined on its own facts and proof.

(2) Impotence means an inability for sexual intercourse; sterility means an inability to conceive or procreate. It is usual to speak of impotence in the male, and sterility in the female. But a female having no vagina would be as impotent as a male without a penis; and a male whose semen contained no spermatozoa, though capable of sexual intercourse, would be as sterile as a female without ovaries. Impotency in women, however, is of rare occurrence.

Impotence may be due to extreme old age, to disease, or to the non-arrival of the age of puberty, which latter may be delayed far beyond the usual period of life. Sterility may be due to the same causes as produce impotency; but it is to be noted that, while the menopause (end of menstrual period of life), occurring usually at from forty to fifty years of age, generally ends the female's power of conception, the male generally retains his virility until sixty or seventy years old, and not infrequently for much longer.

Similarity or likeness of the child to the alleged father, or the contrary, is usually considered strong evidence in fixing paternity. This will include birth-

marks, physical resemblances, racial traits, color, etc. But it should be remembered that if the husband or wife has a small strain of negro blood, say an eighth, though the other spouse have no such admixture, the offspring may have the color and characteristics of a genuine negro.

The various states differ as to the practice of allowing the child to be exhibited to the jury in a paternity case. While resemblances frequently do occur in parent and child, such is not a universal rule; and the frequent similarities in persons having no common ancestry whatever, and the far more frequent occurrences of children bearing no special resemblance to their parents, all tend to discredit similarity as an evidence of parentage, or at least to greatly minify its probative force.

37. **Rape.**—Rape is said to be the carnal knowledge of a woman against her will. But this definition would better state the law's intent if it were modified thus: Rape is the carnal knowledge of a human female without her intelligent consent, express or implied. It is not with an intelligent consent, and therefore is legally against the woman's will, when she either: (1) is mentally deficient; (2) is unconscious from any cause; (3) is under the statutory age of consent; (4) believes the man to be her husband; (5) actively dissents. It is doubtful whether the average man can have complete intercourse with a normal adult woman without her consent; but assault with intent to commit rape is generally punishable almost, if not quite, as severely as rape itself.

When one is accused of rape, or assault with intent

to rape, an examination of the woman's person and underclothing should be made as soon as possible. If much violence has been used, bruises and frequently lacerations will be found on or about the genitals. Lacerations will be found if there was great disproportion between the male and the female organs, as where a grown man has intercourse with a young girl not yet of the age of puberty. If no such signs of violence are present in the child, it is very probable that no serious attempt at rape was made. When considerable violence has been used, and rape accomplished, there will be found in children and frequently also in adults a swollen and inflamed condition of the vulva; sometimes ecchymoses (black and blue spots) will be present and will even extend to the surrounding parts. In children particularly there will likely be a vaginal discharge of purulent (containing or forming pus) matter, and its stains will be found on the clothing. This discharge is also frequently found in adult women who have been raped with violence; but it must be remembered that such vaginal discharges may be due to many other causes than rape or venereal disease.

The presence of venereal disease in both the female and her alleged assailant is often thought to be strong if not conclusive proof of intercourse. The examiner will of course carefully determine the stage of the disease in both victim and accused; and he must also bear in mind that venereal disease may be communicated otherwise than by sexual contact. Young children seem peculiarly liable to this infection from clothing or from the hands of their attendants.

If the rape was committed upon a virgin, and penetration proceeded farther than the vulva, it is probable that the hymen will be torn. The hymen is a membrane stretched across the entrance to the vagina, with a small opening near the urethra. Occasionally this membrane is so tough and elastic that no laceration of it takes place even with repeated intercourse, but it is usually not intact after the first complete intercourse. Unless other evidences of rape were present, the torn hymen would be evidence of sexual intercourse only, either with or without consent. The hymen may be removed or ruptured by surgical operation, or by accident; but that will usually be shown by the history of the case. The virginal condition of the vagina, in appearance a slit, with the walls in contact, is usually not changed by one intercourse, nor indeed by several if they occur at rare intervals. All virginal conditions may be so modified by handling the parts as to suggest frequent intercourse.

Where the rape was committed upon a woman accustomed to sexual intercourse, practically the only physical evidence would be found in such marks of violence as might be present. If little or no force is employed, there may be signs of intercourse, but none of rape. It must not be forgotten that rape is often charged for purposes of blackmail; and also that anaesthetics frequently excite sexual impulses. And not infrequently have women, in dental chairs, for instance, charged the dentist with rape while the victim was unable to resist; a charge honestly made, but wholly without foundation, the belief being due to the effect of the anaesthetic, and so proven.

CHAPTER X.

TOXICOLOGY.

38. **Definition.**—The properties, and effects upon the human body, of the various poisons, together with their history, comprise the science of toxicology. It is very important in Medical Jurisprudence, but must be treated very briefly here, for it is really a distinct and vast science by itself.

A poison is: "Any substance which, when taken into the body and either being absorbed, or by its direct chemical action upon the parts with which it comes in contact, or when applied externally and entering the circulation, is capable of producing deleterious effects." Frequently criminal statutes include the words "other noxious or destructive thing," but the definition here given is probably medically correct.

Poison may enter the body through: (1) the mouth and stomach; (2) the intestines; (3) the lungs and air passages; (4) the skin and membranes; (5) the blood vessels, including wounds. Poisons may be thrown off from the body by means of: (1) the urine; (2) the bile; (3) the saliva; (4) mucous secretions; (5) serous secretions; (6) perspiration. The rapidity and force of the action of poisons will depend upon a number of things, such as the: (1) size and frequency of the dose; (2) form in which it is given;

(3) chemical action; (4) tissues directly acted upon; (5) habit; (6) idiosyncrasy.

Not many poisons are harmful in minute quantities, and a great many are medicinal in moderate doses; but the variations are great, when the whole range of poisons is considered. Thus, aconite, strychnia, or prussic acid can only be administered in very small quantities; while alum or cream of tartar would only be deleterious in large amounts. Sometimes the very largeness of the dose may be the means of saving, instead of destroying, the life; as where it produces a speedy and very copious vomiting, thus ridding the body at once of most of the poison. A substance may be administered in quantities otherwise harmless, but with such frequency that the system cannot properly assimilate it, and so produce deleterious effects.

Poisons differ greatly as to the form in which they are most effective. Some, such as ether and chloroform, act most readily as vapors; others must be dissolved before having their effect, while still others will be weakened by such dilution. So, too, some poisons are more effective when chemically neutralized; others are neutralized in effect also, when compounded. Most poisons work very rapidly and forcefully when they have entered the blood, but have little or no effect upon the unbroken skin. The lungs, too, are quickly affected by the contact of poisons.

Habit is an acquired condition of immunity from the ordinary effects of various poisons, as evidenced by the users of tobacco, opium, and arsenic.

Tolerance is a temporary constitutional immunity

as to certain poisons, usually being the result of disease. For instance, in cases of tetanus, or peritonitis, opium in comparatively large amounts may be given with good results. The term "tolerance" is sometimes used synonymously with "habit," but the difference suggested is the more accurate use of the terms.

Idiosyncrasy is a constitutional condition, not the result of disease, whereby one may be either less or more susceptible to the action of certain substances. Thus, some persons are constitutionally immune from the poisonous action of tobacco. Others may be poisoned by common articles of food, such as oysters, pork, and even bread. Moreover, the same individual may have an idiosyncrasy for some article of food at one time of life, and not at another.

39. **Evidences of poisoning.**—The evidences of poisoning may be classified as follows:

(1) Sudden illness soon after eating or drinking is looked upon as an indication of poisoning, but without more and other evidence is not of much value, for a good many diseases come on suddenly and proceed rapidly. Of course, if several partook of the same dish, and all or a number were similarly attacked, the presumption of poison would be much stronger than in the case of one person only. Most poisons produce their symptoms rapidly; but the same is true of many diseases, such as cholera or apoplexy, whose symptoms often resemble those from irritant and narcotic poisons, respectively.

(2) A post-mortem examination will frequently be necessary to determine whether poison was the cause

of death, and this even though distinct evidences of a corrosive poison be apparent upon the lips or mouth. The examination should be made as soon after death as possible, as decomposition will probably hinder the work, and sometimes produces redness of the stomach similar to that from poisoning. Not infrequently the body will afford no evidence, especially when death was due to narcotic poisoning; this is sometimes also true of irritant poisoning, but much more seldom.

Before removing the stomach and intestines for examination, they should be securely tied at both ends, to prevent the escape of any of the contents. The quantity, odor, and acid or alkaline reaction of the stomach's contents should be noted, together with the appearance of the stomach, especially at its larger end. The same careful, minute attention should be given to the alimentary canal, and to the large and small intestines and their contents. These should all be preserved in clean vessels, sealed, marked with the name of the victim, date of examination, and names of those making the examination, not less than two experienced persons. Careful, complete notes should be taken as the examination proceeds.

Not only the stomach, intestines, etc., should be examined, but also any of the suspected food, medicine, or drink obtainable; any vomited matters, or, if none be obtainable, then the stained portion of the sheet, clothing, or carpet vomited upon; and also urine and fecal matter passed after the symptoms of poison had appeared.

CHAPTER XI.

INSANITY.

40. **Definition.**—It is probably impossible to frame a complete or perfect definition of insanity; and it is almost hopeless to try formulating even an imperfect definition within brief scope. In Bouvier's Law Dictionary it is defined as: "The prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual in health."

The term "insanity" has a very different meaning in medicine from that in law. Many states of mental disturbance which the physician would consider insanity in some of its forms would not be counted so in law. If a person understands, according to his years, the consequences of his acts, the law deems him sane. The law only considers one's mental condition with reference to the one act in question at the time.

41. **Classification.**

- **Mental Unsoundness.**
  - **I. Amentia** (Lack of mentality from birth)
    1. Idiocy—no mental development at all.
    2. Imbecility—slight glimmering of intelligence.
  - **II. Insanity Proper** (Loss of mentality, after development, from disease)
    1. Intellectual.
    2. Partial intellectual.
    3. Moral.
    4. Partial moral.
       1. Kleptomania.
       2. Pyromania.
       3. Dipsomania.
       4. Homicidal.
       5. Suicidal.
    5. Mania.
    6. Paranoia ....
    7. Melancholia.
  - **III.** Dementia—softening of the brain.

42. **Meaning of terms.**—The medical jurist will usually be concerned only with mania, in some of its forms, and it will be well to distinguish certain terms in common use in this connection.

An illusion is a false or mistaken interpretation of a sensation. For instance, one sees a post in a dim light and mistakes it for a man or an animal; or hears a sound which he mistakenly thinks is the voice of a friend. This is not insanity, properly speaking, but merely that the brain does not correctly interpret the impression upon one or more of the senses. An illusion is founded upon a material basis, and may usually be corrected by appealing to the patient's judgment.

An hallucination is a false or mistaken interpretation of a sensation which is wholly subjective. Thus, one thinks he hears voices or sounds where there are none, sees objects where none exist. Hallucinations have no material bases, as illusions have; and when an appeal to the reason cannot dispel or control them, they are considered very certain signs of insanity.

A delusion is a mistaken idea which does not arise from any sense impression, either real or imaginary; that is, the mistaken idea is purely imaginary, solely a creation of the brain, and cannot be corrected by an appeal to the judgment. As where a poor man persistently believes, and tries to act upon the belief, that he is very wealthy; or where one considers himself made of glass. It is common for one to have delusions concerning one thing only, and be perfectly rational upon all other subjects. A delusion is clear evidence of insanity, where it relates to matters of

fact, and not of faith; and if the delusion, although resting in part upon faith, drives one to some violent or criminal act, such as the sacrifice of one of his family, it will be considered an insane delusion.

A lucid interval means a temporary suspension of the effects of the disease causing the insanity, and a return, meanwhile, to the normal mental state. If the act in question, either civil or criminal, be committed during a proven lucid interval, the legal responsibility will be the same as in one who is entirely and permanently sane.

Moral insanity is that form of mental derangement which is characterized by the loss or blunting of the moral perceptions, an inability to judge rationally upon matters of right and wrong. It is extremely doubtful if moral insanity is ever wholly unassociated with intellectual insanity, that form of mental derangement which is accompanied by delusions and hallucinations.

43. **Restraint of the insane.**—The restraint of those mentally deficient is regulated by statute in most states. Generally a complaint must be lodged with the proper authorities; an examination will then be made by competent, disinterested physicians under direction of the officer designated by statute; if they find the patient insane, in any of the various forms, they so report, and upon that report usually is based the determination whether or not restraint shall be ordered. At the present day, such restraint is usually by commitment to an asylum. Not infrequently the person so restrained seeks to regain his liberty by writ of habeas corpus; the question of his

sanity will then be determined by the court, upon all the evidence brought forward.

44. **Civil liability of insane.**—Whether or not one is legally responsible may be questioned with relation to either civil or criminal matters. One who enters into a contract while so mentally unsound that he is unable to comprehend fairly the nature and effect of his acts, is thereby disqualified from making a valid contract; but such contract is voidable only, and may be ratified after the return to reason, or it may then be repudiated. To this rule there is, in many jurisdictions, one exception, viz.: a marriage contract of an insane person is void absolutely. But mere weakness of understanding, or slowness of perception, where no fraud or undue influence has been practiced, is not sufficient to set aside a contract. Thus, if two persons deal with each other fairly, at arm's length, the fact that one is mentally superior and can better foresee and judge the advantages to accrue to him from the bargain he is making, does not invalidate the contract provided the other contractor is able to give rational assent to the agreement. So, one may suffer from paranoia with respect to one particular matter, but if that matter be not the subject of the contract, such mental unsoundness will not invalidate it. So, too, if one is generally insane but has occasional lucid intervals, a contract entered into during such an interval will be binding upon him.

In making a valid will, the law requires that the testator be able to recollect the property he is about to dispose of, to understand the manner of distributing it, and to remember those who are the natural

objects of his bounty. This is, perhaps, a somewhat less degree of intellect than is required for making a valid contract. The will of one generally insane, if shown to have been made during a lucid interval, is valid.

If one offered as a witness is so unsound mentally as to be unable to comprehend the nature of an oath, he is not competent to testify. But one who is to some extent insane may be a competent witness if he understands the nature of an oath, comprehends the facts in question, and can communicate his testimony. Of the credibility and weight of such testimony, the jury is to judge, of course; and evidence of the witness's mental deficiency may be received for the purpose of affecting his credibility.

45. **Criminal liability of the insane.**—Insanity is frequently offered as a defense to a criminal charge, but will not avail unless it can be shown to have existed with reference to the crime charged, at the time of committing it. The rule formerly was that if the accused had sufficient mental capacity to distinguish between right and wrong and to understand the nature of the punishment for the crime committed, he was responsible and must pay the penalty, no matter how mentally deficient he might be on other and even similar subjects; and such may still be the law in a few jurisdictions. But in many of the states today the law recognizes, to some extent, the soundness of the position taken by physicians, namely, that any insanity upon any subject must more or less affect the individual's mentality in every respect. However, it is hardly likely that one would be relieved entirely from

responsibility for a crime committed while suffering from "irresistible impulse" or "moral insanity" simply, although these are recognized by physicians as species of insanity. A crime committed during a lucid interval will not be excused by the fact of general and usual insanity; but the trial and sentence cannot take place while the defendant is insane.

Drunkenness, although usually not a valid defense to crime, becomes so when it actually results in mental unsoundness.

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The list here given is not exhaustive of the works on Medical Jurisprudence, but it comprises the latest and most complete treatises upon the subject, and also a number of briefer texts for students' use: *Chapman,* Manual of Medical Jurisprudence and Toxicology. Philadelphia. This is an excellent student's book; the last edition is recent. *Elwell,* Malpractice and Medical Evidence. New York, 1881. *Ewell,* Manual of Medical Jurisprudence. Boston, 1909. Excellent for student's use, but not intended to be exhaustive. *Taylor,* Medical Jurisprudence. 11th Amer. ed. Philadelphia, 1892. *Wharton and Stillé,* Medical Jurisprudence. 3 vols. (5th ed.). Rochester, 1905. Probably the best and latest exhaustive work. *Herold,* Manual of Legal Medicine. Philadelphia, 1897. This is probably the best single volume work for the American student, whether in a school of medicine or law, or reading alone. Unfortunately, it is out of print.

QUIZ QUESTIONS
LAW OF DAMAGES

(The numbers refer to the numbered sections in the text.)

1. State what remedy the law gives one for a wrongful injury caused by another.
2. Give illustrations of what one may legally do and of what he may not do on his own property.
3. State some of the causes for the rapid development of the subject of damages.
4. When does the court have the right to set aside a verdict of the jury?
5. State the distinction between the powers of the jury in tort actions and in actions on contract.
6. Give an illustration of an injury for which damages may not be recovered.
7. When may there be contribution between tort-feasors?
8. What is meant by the term "liquidated damages"?
9. Give an illustration showing the distinction between liquidated damages and a penalty.
10. In building contracts how will the court determine whether a certain agreement amounts to a penalty or whether on the other hand it provides for liquidated damages?
11. Give a general rule by which courts may determine whether the contract provides for a penalty or for liquidated damages.
12. May liquidated damages be recovered in case of a breach of contract if no actual damages have been sustained?
13. State a case illustrating the distinction between liquidated damages and what are known as alternative stipulations.
14. What is meant by exemplary damages?
15. Jones was the owner of a newspaper. Hardy was employed as reporter for the paper. He maliciously wrote and had

published in the paper a scandalous report bearing upon the character of a young lady, Harriet Smart. Jones, the proprietor, knew nothing of the matter till the publication was made. He immediately discharged Hardy, the reporter, and the following day made a full retraction in the paper.

(a) Has Miss Smart a right of action against Jones?

(b) What items of injury may be shown as a basis of recovering compensatory damages?

(c) May exemplary damages also be recovered?

16. State the objection to imposing exemplary damages for a tortious act which is also criminal.

17. May punitive damages be assessed against a principal for the wrongful acts of his agent?

18. What is meant by proximate and remote damages?

19. Is the question whether the cause of damages is proximate or remote, a question of law for the court or one of fact for the jury?

20. State the rule on this subject established by the case of Hadley v. Baxendale.

21. When may future profits be regarded as an element of damages for a breach of contract?

22-23. State the general rule for the measure of damages where a vendor of goods fails to comply with his contract.

24. A passenger on a railway train was negligently carried beyond the point of her destination. When this was discovered it was in the night time. The train conductor put her off at a small town, took her to a hotel and arranged for her to remain over night there and to return the following morning to the place where she wished to stop. While in the hotel a lamp, given her by the proprietor, exploded, causing her serious injury.

(a) Has she a right of action against the railway company?

(b) May she recover against the railway company for the injury received by the explosion of the lamp?

25. Henry wrongfully struck Thomas in the head with his fist, which on account of the physical condition of Thomas resulted three months later in paralysis. In an action for damages, by Thomas, Henry claimed that (1) he did not know of Thomas' peculiar physical condition and (2) that

he had no intention of inflicting serious injury on him.
(a) Is evidence to sustain these claims admissible?
(b) May damages be recovered in actions in tort for results which were not foreseen by the defendant at the time the wrongful act was done?

26. What is meant by the natural and proximate consequences of an act?
27. In assessing damages for defendant's wrongful act, is it material to determine whether or not the act was unlawful?
28. How may it be determined whether more than one action may be maintained for a single tort?
29. Illustrate by example a case wherein plaintiff might bring more than one action for a single tort.
30. A, by mistake, erected a house in such a way that a twelve-inch wall of the house rested entirely upon the adjacent land of B, who sued for damages. Can evidence of future damages be introduced by plaintiff? Or must the damages be limited to the time of bringing action?
31. Henry wrongfully excavated a ditch on the land of his neighbor Jones, who sues him for this trespass. If the ditch remains open after recovery of damages in this action, may the plaintiff again sue the defendant for additional damages?
32. Give an illustration showing the difference between a temporary and a permanent nuisance.
33. What is the duty of one who removes subjacent support from the land of another?
34. State whether or not more than one action may be maintained against one who wrongfully removes subjacent support from the land of another.
35. Does a judgment for damage on account of a continuing trespass operate as a purchase of a right thereafter to continue the trespass?
36. Does the right to bring more than one action for damages depend upon whether the trespass is in the form of some permanent structure, or whether it is in the form of that which is only temporary?
37. State when more than one action may be brought for a breach of contract.
38. Give an illustration of a divisible contract.

39. State whether or not there may be recovery of damages for mental suffering alone, owing to an act in itself not illegal.
40. Anna Jones, who lived with her mother at Toledo, telegraphed her sister, Mary Jones, at Cincinnati: "Come at once, mother is dying." The message was not delivered through the negligence of the agents of the telegraph company. On this account Mary was unable to see her mother alive, from which cause she suffered great mental anguish. What rights, if any, has she against the telegraph company?
41. Mrs. Runkal was a passenger on a street car, when, through the negligence of the motorman, the car collided with another car, causing her to receive a severe nervous shock which later resulted in paralysis. There was no external physical injury at the time of the accident. Has she a right of action against the street railway company for this injury?
42. May damages for mental suffering be proved in actions for breach of contract as well as in tort? If so, give an example.
43. State some of the reasons which may be given for and some which may be given against plaintiff's right to recover damages for mental suffering where there is injury without personal impact.
44. What is meant by the public policy view of this question?
45. Does it matter in such case whether defendant's act was willfully or only negligently done?
46. Henry, not knowing that anyone was near, shot and killed a dog on the public highway. Mrs. Franks, who was in the vicinity at the time and heard the shot and saw the suffering of the dog, was so shocked thereby that she became ill with nervous prostration and was compelled to remain in her room for several weeks. Has she a right of action against Henry on this account?
47. Davis, a passenger on a railway train, while sitting by a window dodged from a timber projecting from a passing freight train, and struck his head against the sharp corner of a seat in the train on which he was riding. Had he not dodged, he would not have been injured. It was negligence on the part of the railway company to permit the

projecting timber to be on the freight train. Has Davis a right of action against the railway company for this injury?

48-49. A mother and her children were riding on a railway car. The children were wrongfully ejected from the car by the conductor, which caused the mother great distress and mental suffering, resulting in her severe illness. Has she a right of action for damages against the railway company on this account?

50-51. Where defendant's act has injured plaintiff, what is the rule of law relating to avoidable consequences?

52. Plaintiff's fence was broken down by the wrongful act of defendant, which permitted cattle to enter plaintiff's field from time to time, thus causing plaintiff the loss of his pasture for the entire year. Plaintiff could have repaired the fence at small expense. What amount of damage, if any, may plaintiff recover from defendant for this loss of pasture?

53. Benson was employed by Clark as traveling salesman for a year at $100 per month. At the end of three months he was discharged without lawful cause. He sought other employment but failed to find it. At the end of six weeks after his discharge he was offered back his former job by Clark at the rate of $75 per month, but refused to accept it. In an action against Clark at the end of the year, what amount, if anything, should he recover?

54. Sullivan contracted with Henry to paint and repair a carriage owned by Sullivan, for $100. The carriage was delivered to Henry who began work on it, when the following day, after work to the value of ten dollars had been done on the carriage, Sullivan called upon Henry and requested him not to proceed with the work, as he had changed his mind about having it repaired. Henry, however, proceeded to finish the work in accordance with his contract. What are the parties' rights in this matter?

55. Defendant injured plaintiff's horse which was of the value of $100. Plaintiff employed a veterinary surgeon to cure the horse and in his attempt to have the horse cured, spent $125, after which the horse died of the injury. What amount of damages can plaintiff recover from defendant?

56. What is a forward contract?
57. What is an anticipatory breach?
58. January 1, 1908, at Chicago, Karsell entered into a contract with Yoder, thereby selling to Yoder 10,000 bushels of wheat which Karsell then owned, at one dollar a bushel, the wheat to be delivered to Yoder on January 15. On January 2nd, Yoder notified Karsell that he would not take the wheat and that he repudiated his contract. From that date forward wheat declined in price one cent a bushel each day, and on January 15 the market price there was 85 cents a bushel. Thereafter Karsell sued Yoder for breach of contract. It was shown that Karsell still held the wheat. Karsell claimed damages based on the contract price, while Yoder contended that Karsell should have sold the wheat immediately upon the breach of the contract, thus reducing damages. What amount of damages should be recovered?
59. Isham unlawfully struck Clore with a heavy club, from which Clore sustained permanent and serious injury, and for which he sued Isham for damages.
Plaintiff offered to prove:
(1) That Isham was very wealthy.
(2) What the plaintiff, as a physician, had earned in previous years and how his injuries had reduced his fees.
(3) What other physicians in that vicinity earned.
(4) The value of his brother's service for nursing and caring for him although such services were gratuitous.
Which, if any, of these items of evidence, should have been ruled out by the court?
60. January 1, Pratt contracted to sell and deliver to Davis, on May 1, $5,000 face value of certain railroad stock at par. February 1, Pratt notified Davis that he repudiated the contract and would not fulfill it. The stock was then worth 5 per cent. above par and thereafter increased 5 per cent. each month for a year. At the end of a year from May 1, Davis sued for breach of contract. What is the measure of his recovery?
61. What is the nature of damage to property and how may this damage be determined, where there is no market value for such property?

62. How is proof made of the value of property converted or destroyed?
63. To what time would the proof of the value of property converted or destroyed relate?
64. In what way does interest relate to the subject of damages?
65. From what date is interest payable?
66. Under what conditions may interest be recovered on demands which are not liquidated?
67. When is it necessary to make demand in order to recover interest?
68. State when the place of performance of a contract is to be considered in the rate of interest which can be recovered.
69. What is meant by legal rate of interest?
70. After a note falls due, what rate of interest can be recovered thereon?
71. What is the rule relative to the recovery of compound interest?
72. State what the law is concerning the jury's discretion to allow interest in actions sounding in tort.
73. In what kind of tort actions may interest be recovered as matter of right?
74. The defendant purposely destroyed plaintiff's carriage of the value of $500, for which plaintiff has sued defendant.
    (a) What instruction should the court give the jury relating to interest?
    (b) When, if in any case, is the matter of interest within the jury's discretion?
75. What is lateral support?
76. Why is lateral support a property right?
77. May a legislative act authorize the taking of lateral support without compensation to the owner of the adjacent land?
78. State whether or not a municipality may be authorized by a legislative act to take lateral support.
79. Why does the rule of damnum absque injuria apply when property is injured by the acts of the municipality?
80. What reasons are given for and against the owner's right to recover damages when property is injured by the acts of the municipality?

81. What distinction relative to taking lateral support is made where there are buildings on the adjacent land?
82. Sum up the well-established rules relating to lateral support.
83. State a general rule relating to taxing costs as part of the expenses of litigation.
84. Under what conditions may counsel fees of plaintiff be taxed against the defendant as part of the cost?
85. State the rule in this regard in actions for breach of warranty.
86. A, as surety of B, was sued, and believing reasonably that there was a defense to the action, employed counsel to defend it, but was defeated. May he recover from his principal the amount paid the attorney?
87. When may plaintiff's counsel fees in tort actions be recovered of defendant?
88. What is the rule in regard to counsel fees where plaintiff is suing defendant for malicious prosecution?
89. State the rule for the measure of damages where defendant wrongfully took from plaintiff's land, growing timber or coal, attached to the land.
90. In whom is the title to property when severed from the land by a trespasser, and by him converted?
91. Is it material in such a case, in order to determine the measure of damages, whether the property was severed and taken willfully or negligently by the trespasser?
92. What is the liability of one purchasing such property from a trespasser, who thus took it from the owner of the land?
93. In such a case will the fact that the purchaser was innocent of the trespasser's wrong, have any effect on the amount of damages which may be recovered from such innocent purchaser?
94. If such property has been improved by the trespasser, may the owner replevy it from him without being responsible for its improved value?
95. May one who has only a special interest in property, such as a bailee, recover from a wrongdoer either the full value of the property or damages equal to the full injury to said property?

96. State the rule governing the right of mortgagees to recover for damages to mortgaged property.
97. What is the nature of damages for a breach of warranty of a chattel?
98. What is the reason for the rule which permits plaintiff to recover more than the difference between the price and the value of the article in case of breach of warranty?
99. State the rule governing the nature of damages in an action for breach of warranty of title to land.
100. What is the New England rule relating to breach of warranty of title to land?
101. Suppose plaintiff has been evicted from only a portion of the land, what will be the measure of his recovery in an action for breach of warranty?
102. When a remote vendee sues for breach of warranty of title to land, state whether recovery is limited by the amount paid to the remote grantor as purchase money, or by the amount which plaintiff paid for the land to his own grantor.

QUIZ QUESTIONS
LAW OF INSURANCE

(The numbers refer to the numbered sections in the text.)

1. (a) Is insurance a good thing for everybody? (b) Would you advise a bachelor, with no one dependent upon him, to insure his life? (c) Does a man who fails to die during the five years for which his life is insured receive back anything, tangible or intangible?
2. (a) Why should uneducated people have objected to fire and life insurance? (b) Are life insurance agents useful members of society?
3. (a) What resemblance exists between lotteries and life insurance? (b) Is fire insurance worth as much as it costs?
4. Why do we spend so much time on "agency" in law school today, while Blackstone knew apparently almost nothing on the subject?
5. Would it be advisable to provide, by statute, that, in actions against insurance companies on policies issued by them, the defendant shall not be permitted to set up want of insurable interest as a defense, if it accepted the premiums paid without objection on this ground?
6. (a) One who has a legal or equitable interest in property always has an insurable interest therein. Is it equally true that if he has an insurable interest in the property he has a legal or equitable interest therein? (b) Should a man be permitted to insure his old homestead to the amount of its value to him or only to the amount of its market value?
7. If the state of X requires an insurable interest in property to exist when the insurance is effected, and the state of Y requires such interest only when the loss occurs, and the state of Z requires an interest at both times, which of the

three states would be least troubled by arson, if other conditions are equal? Would there be more arson in Y than in Z?

8. (a) Should the owner of a railroad be permitted to insure the life of a faithful locomotive engineer? (b) Should a widower be permitted to insure the life of his deceased wife's sister who keeps house for him but whom he can not marry under the law of the jurisdiction in which he lives? (c) X has broken his promise to marry Y. Can Y now insure his, X's, life?
9. (a) If a beneficiary is permitted to continue to hold life insurance upon the life of one in whose life such beneficiary has ceased to have an insurable interest, is there not danger of murder? (b) What reason can be given for allowing the beneficiary to retain such insurance?
10. What is the difference, in legal effect, between warranting a horse sound in a contract of sale, and a building fireproof in an insurance contract?
11. A, in applying for life insurance, conceals the fact that he is about to become a bankrupt. Can the company avoid the policy on this ground?
12. How can you prove that a man misrepresented his opinion as to the state of his health?
13. Why should an insurance company desire to make all representations warranties?

10-13. Make a chart showing the effect of good faith and materiality in cases of concealment, representation, and warranty, thus:

	Good Faith.	Materiality.
	Is the good faith of the insured an issue?	Is the fact that the matter is immaterial an issue?
Concealment		
Representation		
Warranty		

14-15. (a) What is the reason for the existence of the doctrine of subrogation? (b) Would fires be of more frequent occurrence if this doctrine did not exist?

16. If the contract of insurance expressly provides that the right of subrogation shall not exist, would it exist nevertheless?

17. Aeroplanes A and B collide in the air. Both are damaged. A is insured. A's insurer pays for the loss in full. Has the insurer any means of obtaining reimbursement?

18. A builds a house worth $3,000 for that amount. He pays an additional $100 to the Asbestos Shingle Company which roofs the house and agrees, in consideration of the extra hundred, to rebuild the house if sparks fall on the roof and cause the house to burn within the next ten years. The house was insured for $2,500. Discuss the rights of the insurer against the shingle company in case of fire.

19. A fire insurance company, merely as a matter of advertisement, rebuilds a house negligently destroyed by fire by a railroad. Discuss the right of subrogation here.

20. Have you ever heard of an express company insuring a package? In such a case, is it an insurer?

21. (a) When is the owner of a $3,000 house insured for $2,000 fully indemnified for its total destruction? (b) Is there such a thing as subrogation pro tanto?

22. Is a person who ships goods and agrees that the carrier shall have the benefit of any insurance guilty of concealment if he later insures the goods and does not disclose this portion of his agreement with the carrier to the insurer?

23. Under a valued policy law, an insurer is compelled to pay the insured $3,000 for the loss of a $2,500 house. How much may the insurer recover from the tort-feasor who caused the loss?

24. X negligently kills a horse insured against death by C. If C replaces the horse, may he claim subrogation to the insured's rights against X?

25. X negligently breaks F's nose. F collects from an accident insurance company. May the company then collect from X?

27. (a) Is one estopped from asserting a right which he has waived? (b) Does one always waive a right which he is estopped from asserting? (c) State the elements of estoppel, and also the elements of waiver.
28. Is the parol evidence rule followed in courts of equity?
29-31. The policy provides that, owing to the impossibility of freeing a place once used for a match-factory from particles likely to take fire spontaneously, if the property in question has been used as a match-factory before the policy is delivered, is then, or is in the future used for this purpose, the policy shall be void. At the time the policy is delivered the insured informs the agent that the building has been used for that purpose and that, though it is not so used at present, it is again going to be used for this purpose within the next 50 days. The agent replied, "These facts cut no figure." What part, if any, of this conversation may be shown in an action at law on the policy?
32. What would be the effect of a clause in the policy by the terms of which the insured agrees that the insurer need not send notice of the maturity of premiums as required by statute?
33. To what extent are incontestable policies contestable?
35. What objections may be urged to the assignment of a fire insurance policy though not to the assignment of a promissory note?
36. Is it more important to prevent arson than murder? Are there any cases in which life and not fire insurance may be assigned?
38. Is it not a case of over-insurance if a life tenant insures property for its full value?
39. What is the extent of the insurable interest of a mortgagee in the property mortgaged? Has he an insurable interest if the land mortgaged without the house on it is more than sufficient to pay the mortgage?
40. Has the beneficiary in life insurance any rights against the insured?
41. Why should the insured ever desire to have the beneficiary unconditionably designated as such?
42. (a) Are not the rights of a beneficiary always subject to

the condition that the premiums must be paid? (b) What other conditions may be attached to the beneficiary's right, and with what effect?

43. (a) If A gives B a horse on condition that A is to have it back, on demand, what is the nature of B's rights until the demand is made? (b) Compare this with the situation arising when A takes out insurance in B's favor, but reserves the right to change the beneficiary.

44. What must be surrendered to obtain the surrender value of a life insurance policy? Who must do the surrendering?

46. May a creditor of the insured institute garnishment proceedings against the company in which the debtor has taken out fire insurance, and, if so, under what circumstances?

48. What effect has the existence of a surrender value upon the rights of the creditor of the beneficiary in a life insurance contract?

49. In so far as the rights of creditors are concerned, what is the difference between the right of the insured to transfer to his wife his life insurance, and his right to transfer a calico dress or a diamond necklace to the same person?

50. Point out any differences between the extent of a creditor's insurable interest in the life of his debtor and his right to recover under such a policy.

51. Why should life insurance and not funds in a savings bank be exempt from the claims of creditors?

53. If a number of companies agree upon a certain form of policy, have we a standard form of policy?

54. Distinguish void and voidable.

55. Compare the terms: location and residence. Where does a man reside if his home is in X and he is on a visit to Y?

56. Determine, by examining a statute book, or a work on procedure, when a civil action is deemed commenced.

57-58. Distinguish: other insurance; over-insurance; co-insurance.

59. If the insured discards rubber boots and commences to wear shoes with metal tacks in the soles, has he increased the risk of loss to his flour mill? Assume that it is a gunpowder factory instead of a flour mill.

60. (a) What is the difference between vacating a vault in a cemetery and a residence? (b) May one person occupy two residences at the same time?
61. Does fire exist when an electric arc light is in use?
62. Can a hostile fire exist in a stove? In a pipe intended for smoking?
63. May the insured recover from a fire insurance company for the loss of the insured's spectacles and overcoat while assisting in putting out a fire in his residence?
65. May sabotage be war or riot?
66. In putting out a fire, the water pressure is so strong that the stream from the firemen's hose demolishes the building. Is the fire insurance company liable?
67. What is the proximate cause of loss by theft during a fire?
68. Is not contributory negligence always a defense in a civil action?
69. (a) Can steam explode? (b) Is the fire insurance company liable for a fire caused by explosion, or an explosion caused by fire?
70. Lightning strikes a tree and causes the tree to fall over and cave in a house, which takes fire at once and is completely consumed. Discuss the fire insurance company's liability.
71. If part of a building falls and then the building burns, though not as an effect of the falling, for what amount, if any, is the insurance company liable?
72. May a fire insurance company cancel a policy because of personal enmity between the president of the company and the insured? Or for the sake of oppressing the insured?
73. What is the difference between the cash value of property, its market value and its value to the owner?
74. How may a man make a legitimate profit from a fire insurance company when it fails to exercise the option to rebuild?
75. Can you frame a valued policy law applicable in case of partial loss?
76. Distinguish notice of loss from proofs of loss.
77. Who are magistrates?

78. Compare the provision in regard to the time when an action must be commenced on a fire insurance policy with the question which arises in constitutional law when the legislature cuts down the time within which an action on an existing contract may be brought.
79. Do you ever hear of a life insurance company in the name of which the word "mutual" appears? "Mixed" or "stock"? Explain these terms.
80. Distinguish mutual and mutual benefit companies.
81-82. Distinguish premiums and assessments.
83. Distinguish cash loan and surrender values. Why should an insured person surrender his policy if both sums are the same in amount?
84. If the insured suddenly becomes insane on his way to the insurer's office intending to pay his premium, is non-payment excused?
85. Is it true, in the law of contracts, that the creditor must always give the debtor notice of the amount due before suing for breach of contract, where the determination of the amount is peculiarly within the knowledge of the creditor?
86. Why is it more fraudulent to insure one's life with the present intention of committing suicide than to take out the insurance in good faith and form the intention thereafter?
87. (a) Can an insane man commit suicide? (b) If one kills himself by drinking carbolic acid for coffee, has he committed self-destruction?
88. How insane must a man become to make himself incapable of committing suicide?
89. Did John Brown die at the hands of justice? Nathan Hale? Jesse James? One shot in lawful self-defense?
90. (a) Does death ever result from a violation of law, except in cases of capital punishment? (b) Is it the act or the violation of law which causes death when one is killed in the act of burglary by the resident of the house entered?
92. Does a fire insurance policy cover losses due to the hostile acts of man? What is the rule in marine insurance?

93. Can you see any connection between England's tariff for revenue policy and her rule in regard to illegal ventures?
94. What reason for the rule in reference to general average loss can be suggested?
95. Why should the doctrine of constructive total loss exist in marine but not in fire insurance?
96. By abandonment do we mean that the ship may be allowed to drift and be utterly deserted in mid-ocean?
97. In fire insurance, if the company exercises its option to rebuild, is any allowance made by reason of the fact that the insured gets a new house in place of what may have been an old one? Compare the rule in marine insurance.
98. Explain the labor clause in marine insurance.
100. Is it an accident to choke on too large a bite of beefsteak?
101. Is there a visible mark of injury if one is scared to death?
103. When is a person intoxicated?
104. What is poison?
105. Can we inhale anything else than gas? Are we inhaling gas all the time, when not exhaling?
106. Is one who allows himself to be tattooed submitting to intentional injury?
107. If one loses his reason in an accident is he necessarily totally disabled?
108. Why is a surety a favorite of the law? Why not a guaranty insurance corporation?
109. Does employers' liability insurance encourage carelessness on the part of employers?

QUIZ QUESTIONS

ADMIRALTY LAW

(*The numbers refer to the numbered sections in the text.*)

1. What customs are the basis of admiralty law?
2. How did the system of consular courts arise?
3. State the principal ancient admiralty codes.
4. What code first treated of marine insurance?
5. What was the origin of the English Court of Admiralty?
6. What were the principal respects in which the jurisdiction of the English admiralty courts was restricted?
7. Were there admiralty courts in the American Colonies before the Revolution?
8. State the provision of the United States Constitution in respect to admiralty jurisdiction.
9. What is the American test of admiralty jurisdiction?
10. What vessels are subject to admiralty jurisdiction?
11. What is the test of admiralty jurisdiction over contracts and over torts?
12. Has admiralty jurisdiction of a tort commencing upon water and terminating on land?
13. Does the common law doctrine of fellow servants apply in negligence suits in admiralty?
14. What is the trend of decisions in respect to the jurisdiction of admiralty over death claims?
15. What rules largely govern collisions?
16. What is the rule in respect to an admiralty lien for repairs or supplies in a foreign port?
17. What was the rule formerly, and what is the rule now, in respect to supplies furnished in a domestic port?
18. What is the difference between a bottomry and a respondentia bond?
19. What is necessary to transfer title to a vessel?

20. Is a minority owner who has dissented from the use of a vessel, liable for the acts of the master?
21. What is the rule in England and this country in respect to the limitation of liability?
22. How does a maritime lien differ from a common law lien?
23. Can a mortgage on a vessel be foreclosed in admiralty?
24. What is a contract of affreightment?
25. Is any freight earned if a voyage is not completed?
26. When is a ship a common carrier?
27. What is a bill of lading?
28. What is a charter party?
29. State the substance of the Harter Act.
30. What is a stevedore?
31. State the prerequisites for shipping seamen.
32. When is the tug, and when the tow, liable for negligence in navigation?
33. What is general average?
34. What avoids a policy of marine insurance?
35. What is a constructive total loss?
36. What is a salvage service?
37. What are the elements for an estimate of a salvage award?
38. What rules govern ocean navigation and harbor navigation?
39. State the main principles governing the rule of the road at sea.
40. What is the rule of compensation when both parties to a collision are at fault?
41. State the difference between a suit in rem and a suit in personam.
42. What rules govern the practice in admiralty in the federal courts?

QUIZ QUESTIONS

MEDICAL JURISPRUDENCE

(*The numbers refer to the numbered sections in the text.*)

1. Define medical jurisprudence, and give the classes of questions comprehended therein.
2. (a) State what should be the physician's conduct as a witness. (b) What are privileged communications? (c) May the privilege be waived, and if so, how, and by whom?
3. (a) Is the physician entitled to more than the ordinary witness fee? (b) Jones falls in the street, sick; Brown says to Dr. X: "Take care of him until he is well, Doctor, and I will see you paid." Is Brown directly liable? Why?
4. (a) Must a physician always respond to a call? (b) Does the fact that his services are gratuitous relieve him from liability for negligence? (c) How will the court regard transactions between physician and patient?
5. What is a dying declaration, and what should the physicians do concerning it?
6. State the duty and the powers of coroners.
7. Define malingering, and give the physician's duty in such cases.
8. Your client is the only heir of Mrs. Isadore Straus, who, with her husband, was lost in the Titanic disaster. Most of the Straus' property was in his name. Both died intestate. Can your client obtain the property, and why? Assume Mrs. Straus was heir apparent of Mr. Straus.
9. (a) Define and classify malpractice. (b) State the obligation the law imposes upon one holding himself out as a physician or surgeon. (c) Does the physician, by undertaking a case, guarantee a cure? (d) What is the

effect of the patient's disobedience to the physician's directions, on the liability of the latter for malpractice?

10. By what means would you attempt to identify living persons?
11. How may the dead body be identified?
12. From an examination of human bones, how far can you go toward identifying the remains?
13. (a) How may hairs be distinguished from fibres? (b) What is the chief difference between human and animal hairs? (c) Describe the difference in appearance of hairs from the various parts of the body.
14. (a) What are the first questions to be determined with reference to suspected stains? (b) Describe the different tests for blood? (c) May you distinguish venous, menstrual and arterial blood? Give reasons?
15. (a) Distinguish somatic from molecular death. (b) Which is meant by the word "death," in the popular sense?
16. (a) Give the different signs of death. (b) How would you determine whether respiration had ceased? (c) How may cessation of circulation be shown? (d) What do you understand by rigor mortis? (e) Give the order in which decomposition will progress. (f) How will you determine how long a time has elapsed since the death of a body?
17. Define syncope, and state to what it is due.
18. Define coma, and give its symptoms.
19. What is asphyxia, and what are its indications?
20. (a) Distinguish suffocation from smothering. (b) Is suffocation a usual means of homicide? (c) Of suicide?
21. (a) To what is strangulation due? (b) How will you determine whether death was caused by strangulation?
22. (a) Distinguish hanging from strangulation. (b) How will you determine whether the body was hanged before or after death?
23. (a) What is drowning? (b) Is it common in suicide? (c) In homicide? (d) Give the post-mortem appearances of one drowned.
24. In what instances is death likely to result, designedly, from cold?
25. (a) Give the different forms of heat affecting the body.

(b) Is rigor mortis delayed, or accelerated, by death from heat?

26. Give some of the peculiar indications of death from electricity.
27. (a) In what ways may starvation take place. (b) Give the post-mortem appearances of one starved.
28. Define a wound.
29. Classify wounds (a) as to the mode of their production; (b) as to the presence or absence of infection; (c) as to depth.
30. (a) Why consider wounds medico-legally? (b) May death be due to more than one cause, in any given case? (c) How will you determine if the wound was made before or after death?
31. (a) Distinguish burns from scalds. (b) Give indications that death preceded the burns.
32. State the usual signs of pregnancy.
33. What are the general signs of delivery, and how long do they remain?
34. (a) Define and classify abortion. (b) How would you detect it?
35. (a) Define infanticide. (b) State the signs of maturity of the child. (c) What indicates that the child is that of the prisoner? (d) What are some of the natural causes of death of an infant? (e) Give some of the evidences of live birth. (f) What is the hydrostatic test, and how is it used? (g) State the causes of death of the fœtus *in utero*.
36. (a) When is a child deemed legitimate? (b) Distinguish impotence from sterility. (c) What evidence may be offered to show that A is the father of a certain bastard child?
37. (a) Define rape. (b) Mention evidences thereof in case of a woman accustomed to sexual intercourse? (c) Name evidences in case of a young girl. (d) What is often the effect of anæsthetics upon the sexual impulse?
38. (a) Define a poison. (b) How may poisons enter the body? (c) How are they thrown off from the body? (d) Define and distinguish the three terms: habit, tolerance, and idiosyncrasy.

39. State the usual evidences of poisoning.
40. Define insanity.
41. Classify insanity.
42. (a) Define and distinguish: illusion, hallucination, delusion. (b) What is a lucid interval? (c) Distinguish moral from intellectual insanity.
43. Give mode of restraining an insane person.
44. (a) Last year your client, while temporarily insane, executed a contract with one not knowing his insanity. Advise as to his rights. (b) He also married while so insane, the woman thinking him sane; both now desire the union to continue. Advise them. (c) Brown thinks his legs are snakes, but he is otherwise apparently sane. His will seems rational, except that he has disinherited a wild and incorrigible son. Advise that son of his chances for breaking the will on ground of insanity.
45. (a) Same delusion as in "(c)" just above; Brown forges Black's name to a check. Is insanity a good defense? (b) Will drunkenness relieve from penalty for a crime? Why?

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LEADING ILLUSTRATIVE CASES LAW OF DAMAGES

CHAPTER I.

THE SUBJECT OUTLINED AND DEFINED.

Damnum Absque Injuria.

PAUL K. RANDALL v. HORACE L. HAZELTON AND ANOTHER.

12 Allen 412 (Mass.). 1866.

In this case the plaintiff was the owner of certain premises on which he had executed a mortgage. Before the mortgage became due the mortgagees assured him that they did not care for the money and would give him ample notice when they desired payment. Plaintiff alleges, however, that the defendants in the case conspired together for the purpose of obtaining control of the mortgage and depriving the plaintiff of his property, and by maliciously representing to the mortgagees that they desired the mortgage assigned to one Merrill, they induced the mortgagees to assign the mortgage; that the defendants in this manner secured the mortgage and sold the premises, in accordance with the terms of the mortgage, and put the plaintiff to great expense in redeeming the land and again legally obtaining possession of it. He brings this action in tort against defendants to recover the damages thus sustained. To his petition the defendants filed a demurrer.

COLT, J. The question raised by the demurrer is whether, upon the facts charged, the action can be maintained. It is an ancient and well-established legal principle that fraud without damage or damage without fraud gives no cause of action; yet when the two do concur, there an action lieth. 3 Bulst. 95.

Actions like the one under consideration are all based upon this proposition; but it cannot safely be applied as a test by which to determine whether the facts in any case constitute an actionable wrong, without keeping in mind the meaning which the law, by a series of judicial decisions, has attached to the terms used. It is well settled that every falsehood is not necessarily a legal fraud or false representation. It is said that a false representation is an affirmation of that which the party knows to be false or does not know to be true, to another's loss or his own gain. Lobdell v. Baker, 1 Met. 201. So in reference to the term damage, the law is that it must be a loss brought upon the party complaining by a violation of some legal right, or it will be considered as merely damnum absque injuria. There is a large class of moral rights and duties, sometimes called imperfect rights and obligations, which the law does not attempt to enforce or protect. The refusal or discontinuance of a favor gives no cause of action. If one trusts to a mere gratuitous promise of favor from another and is disappointed, the law will not protect him from the consequence of his undue confidence, nor encourage carelessness or want of prudence in affairs. Damages can never be recovered where they result from a lawful act of the defendant. The exercise of a right conferred by a valid contract, in the manner provided by its terms, cannot be the ground of an action. The law will not inquire into the motives of the party exercising such right, however unfriendly and selfish. The trouble and expense and risk of loss ought to and must be presumed to have been contemplated when the contract was entered into. The foreclosure of a mortgage under a power of sale, for example, may be made at such time and under such circumstances as to cause great distress and sacrifice to the mortgagor; but, whatever the motive of the mortgagee, no remedy is afforded for his oppressive conduct, if the requirements of the contract have been fulfilled.

But a more important consideration in this connection is, that the damage which this doctrine contemplates must not only be caused by the fraud and misconduct of the defendant, but it must be the direct and immediate consequence of the wrongful act. The law looks to the proximate and not the remote cause of the injury. It were infinite, says Lord Bacon, to consider the cause of causes and their impulsion of each other; therefore

it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree. This is the only practical rule which, in view of the complication which surrounds this doctrine of causation, can be adopted in the administration of justice by human tribunals. Where the fraud and damage sustain this intimate relation of proximate cause and effect, and not otherwise, they are said to concur, in the sense of the proposition above stated.

Applying the doctrine thus explained to the plaintiff's case as stated in the first count, we are of opinion that he sets forth no legal cause of action. The declaration shows no consideration for the alleged promise of the mortgagees to inform the plaintiff, in case the amount of the debt should be wanted by them. It was an agreement not legally binding upon them. There was nothing in it to prevent them in law from proceeding to do all the acts in relation to advertising and selling the property which were done by the defendants; nor did it prevent them from assigning the mortgage. It cannot be said to be an invasion of any legal right for the defendants to deprive the plaintiff, even by falsehood, of the benefit of this gratuitous undertaking. Hutchins v. Hutchins, 7 Hill 104. It is not alleged that the defendants knew of the alleged promise of the mortgagees. The false representation of a material existing fact for the purpose of procuring the transfer might have enabled the mortgagees to avoid it, or maintain an action for any loss sustained by them, but until avoided the title passed to the defendants. If the declaration had contained averments of a good legal consideration for the promise to give the notice to the plaintiff, then it would seem to follow that the plaintiff's remedy would be ample against the mortgagees for all loss suffered by him by reason of the breach of their agreement, leaving them to whatever remedy they might have against the defendants for the fraud practised by them. And this fact is said by Morton, J., in Lamb v. Stone, 11 Pick. 532, which was a case like this, to be good ground for refusing relief; for if the plaintiff "may have redress by any of the forms of actions now known and practised, it would be unwise and unsafe to sanction an untried one, the practical operation of which cannot be fully foreseen."

But the more important fact is, that this specific act of obtaining the assignment in the manner stated in itself produced no

direct and immediate damage to the plaintiff. The damage resulted solely from the foreclosure and forced sale of the premises, and would have been no more and no less if the mortgage had not been assigned, and the mortgagees had pursued precisely the course charged upon the defendants in regard to the sale. It was undoubtedly a necessary step in order that the defendants might practise the alleged oppression; but it was not the immediate cause of the injury. The substantial, efficient and immediate cause of the loss to the plaintiff was the foreclosure and sale. And we are not permitted to go behind and inquire into the antecedent causes, near or remote. * * *

Contribution Between Tort-Feasors.

FARWELL & CO. v. GERHARD BECKER AND ELBERT SHIRK.

129 Ill. 261, 16 Am. St. Rep. 267.

Bill in equity by John V. Farwell & Co. against Gerhard Becker and Elbert W. Shirk for contribution. In December, 1881, the plaintiffs and the defendants brought separate actions against the firm of Olquist Brothers, in Jones County and in Linn County, Iowa, and attached under their separate writs a stock of goods which Olquist Brothers had sold and delivered to N. A. Sunberg, and also another stock of goods sold by Olquist Brothers to N. A. Sunberg and one F. B. Olquist. The several suits by attachment were prosecuted to judgment, and a receiver was appointed who took charge of the goods and sold them, and realized from the goods attached in Jones County $4,080.14. N. A. Sunberg and Sunberg and Olquist, claiming under the sales hereinbefore mentioned, commenced separate actions against the sheriffs of Linn and Jones counties, and the complainants and defendants in this action were substituted as defendants in place of the sheriffs of those counties. Those actions resulted in judgments in favor of the plaintiffs therein, and against the plaintiffs and defendants in the present action; and the complainants in this action, being pressed for the immediate payment of those judgments, and threatened with a levy upon their property, gave checks for the full amounts thereof, and took an assignment thereof in favor of one of their attorneys for the

avowed purpose of keeping the judgments alive, and enforcing contribution from their co-defendants. The trial court found that the defendants, Becker and Shirk, the latter being a member of the firm of Sherer, Shirk & Co., were each liable to contribute in proportion to the respective amounts collected by means of the attachment writs, and it was decreed that said Shirk pay complainant $544.75, and that the defendant Becker should pay $5,047.75.

Several questions have been discussed by counsel, in the argument, but there is but one question of any importance presented by the record, and that is, whether complainants in the original bill (appellants here) have the right to require Gerhard Becker to contribute to the payment of the judgments rendered in the district courts of Jones and Linn counties, Iowa, and costs, which the complainants had paid, in consequence of the levy on the goods as the property of Olquist Brothers.

It is insisted by appellee that in the attachment and sale of the goods in Iowa, the complainants and Gerhard Becker, the defendant, were all wrongdoers, and that no right of contribution exists between wrongdoers. There are cases which hold that no right of contribution exists between wrongdoers. Merryweather v. Nixon, 8 Term. Rep. 186, may be regarded as a leading case on the subject. Nicholas v. Nowling, 82 Ind. 488, Peck v. Ellis, 2 Johns. Ch. 131, Cumpston v. Lambert, 18 Ohio 81, 51 Am. Dec. 442, and Spalding v. Oakes, 42 Vt. 343, hold the same doctrine. There are other cases where the same rule has been declared, but we do not think the weight of authority sustains the doctrine that no right of contribution exists between wrongdoers as it is broadly stated in Merryweather v. Nixon, supra. Indeed, the later English cases do not, in our opinion, sustain the doctrine as it is laid down in that case. The question arose in Adamson v. Bidgood, 4 Bing. 66, and in passing upon the question, among other things, Bert, C. J., said: "It was certainly decided in Merryweather v. Nixon that one wrongdoer could not sue another for contribution. Lord Kenyon, however, said that the decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right. This is the only decided case on the subject that is intelligible. The case of Phillips v. Biggs, Hardr. 164, was never decided, but the court of chancery seemed

to consider the case of two sheriffs of Middlesex, when one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors. From the inclination of the court in the last case, and from the concluding part of Lord Kenyon's judgment in Merryweather v. Nixon, and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases were the person seeking redress must be presumed to have known that he was doing an unlawful act." What was said in the case cited was approved in a later case. Betts v. Gibbons, 2 Ad. & E. 57; see also Nooley v. Batte, 2 Car. & P. 417.

Story on Partnership, § 220, after stating what is regarded as the general rule, that no right of contribution is allowed, by common law, between joint wrongdoers, says: "But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known, meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one of construction or inference of law."

Armstrong Co. v. Clarion Co., 66 Pa. St. 218, 5 Am. Rep. 386, sanctions the rule announced in Story, and after reviewing the authorities on the question, holds that where the tort is a known, meditated wrong, contribution cannot be had, but where the party is acting under the supposition of the entire innocence and propriety of the act, contribution may be awarded.

In Bailey v. Bussing, 28 Conn. 455—a leading case on the subject—it was held: "The rule that there can be no contribution among wrongdoers has so many exceptions that it can hardly, with propriety, be called a general rule. It applies properly only to cases where there has been an intentional violation of the law, or where the wrongdoer is presumed to have known that the act was unlawful."

In Jacobs v. Pollard, 10 Cush. 287, 57 Am. Dec. 105, the supreme court of Massachusetts state the law as follows: "No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act by seeking an indemnity or contribution from those with whom or by whose authority such unlawful act was committed. But justice and sound policy, upon which this salutary rule is founded, alike

require that it should not be extended to cases where parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves or others, although they may have thereby infringed upon the legal rights of third persons. It is only where a person knows, or must be presumed to know, that his acts were unlawful, that the law will refuse to aid him in seeking an indemnity or contribution. It is the unlawful intention to violate another's rights, or a wilful ignorance and disregard of those rights, which deprives a party of his legal remedy in such cases."

Acheson v. Miller, 2 Ohio St. 203, 50 Am. Dec. 663, is a case in its facts quite similar to the present case. In the discussion on the right of contribution, the supreme court of Ohio said: "The rule that no contribution lies between trespassers, we apprehend, is one not of universal application. We suppose it only applies to cases where the persons have engaged together in doing, wantonly or knowingly, a wrong. The case may happen that persons may join in performing an act which to them appears to be right and lawful, but which may turn out to be an injury to the rights of some third party, who may have a right to an action of tort against them. In such case, if one of the parties who has done the act has been compelled to pay the amount of the damages, is it not reasonable that those who were engaged with him in doing the injury should pay their proportion?"

After reviewing the authorities the court holds that the legal rule is, that when parties think they are doing a legal and proper act, contribution will be had, but when the parties are conscious of doing a wrong, courts will not interfere. See also Coventry v. Barton, 17 Johns. 141, 8 Am. Dec. 376.

Under the authorities, we think it is clear that if the attaching creditors, at the time they sued out their attachments and seized the goods, acted in good faith, exercising such prudence and caution as an ordinarily prudent person would exercise, with no intention of committing a trespass or injuring any one, but with the honest belief that the transfers made by Olquist Brothers were fraudulent as to creditors, the right of contribution exists, although it ultimately turned out that the seizure of the goods was unlawful and unwarranted. The facts surrounding the transaction at the time the levy was made were such, in our

opinion, as to lead any prudent person to believe that the goods were liable to be attached by creditors, as was done. Olquist Brothers were, at the time of the pretended sale, largely indebted to various parties. A day or two before the attachments issued, they claimed to have sold the Monticello store to N. A. Sunberg, and the other stock to N. A. Sunberg and F. B. Olquist, another brother. No effort was made to adjust or pay their liabilities. They retained no other property liable to levy or sale. These and other kindred facts were brought to the attention of the attaching creditors before they proceeded to seize the goods. If the sales were fraudulent, although the possession of the goods was turned over to the purchasers, the creditors had the right to levy.

Were not the facts surrounding the transaction such that a reasonably prudent person might well believe that an attempt had been made to defraud creditors? If so, it cannot be said that the attaching creditors, in making the levy, intentionally violated the law. Nor were they presumed to have known that the levy was unlawful. The fact that the goods, when attached, were in the possession of Sunberg, is not a controlling fact. The surrounding circumstances indicated that the pretended sale was fraudulent, and if fraudulent, as it appeared to be, the creditors had a right to attach the goods, although in possession of a pretended purchaser, and a seizure, under such circumstances, cannot be regarded as tortious.

As to the equities of the case, they are with the complainants. The defendant, as well as complainants, sued out attachments, which were levied on the goods. He assisted in defending the actions brought by the claimant of the goods. His debt was fully paid from money arising out of a sale of the goods under attachment, and as the complainants have been compelled to refund the value of the goods, equity and fair dealing unite in requiring the defendant to contribute his just proportion of the burden which has been cast upon the complainants on account of the seizure and sale of the goods. We think the decree of the circuit court holding Becker liable to contribute was correct.

* * * * * * * * *

The judgment of the Appellate Court, as to defendant Becker, will be reversed.

Judgment reversed.

Nominal Damages.

STANTON v. NEW YORK AND EASTERN RY. CO.

59 Conn. 272, 21 Am. State Rep. 110. 1890.

Nominal damages mean no damage at all. They exist only in name, and not in amount. In the quaint language of an old writer, they are "a mere peg to hang costs on." They are such as are to be awarded in a case where there has been a breach of a contract and no actual damages whatever have been or can be shown. The facts in connection with the claim of Mr. Hungerford, as found or as admitted by the pleadings, are such as, under most circumstances, would seem to require that more than nominal damages should be allowed. They show that Mr. Hungerford was ready and willing at all times and able to perform the contract fully on his part, and that he would have done so except that he was prevented from so doing, and so was prevented from earning the whole sum of five hundred thousand dollars in the fully paid-up capital stock of the corporation, by the acts and omissions and inability of the company.

It is a general rule of law that one who violates his contract with another is liable for all the direct and proximate damages which result from such violation. It is a rule so obviously just and so well established by authority that it ought not to be called in question. It is also a rule of law that "in all cases of prevention of performance, where the plaintiff has been deprived by the defendant of the benefit of the contract, the plaintiff is entitled to recover what he has lost by the act of the defendant." Addison on Contracts, 881. See also Chitty on Contracts, 11th ed., 1323, note b; 1 Sedgwick on Damages, 7th ed., 473. In Wells v. Abernethy, 5 Conn. 227, this court laid down the same rule. Judge Hosmer, in giving the opinion, said: "If the party omits to do what he stipulated, it is just, as a reasonable substitute, that he should pay the precise value of the thing he contracted to do. * * * When a contract has been violated, the compensation of the party complaining of the violation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value." * * *

CHAPTER II.

LIQUIDATED DAMAGES.

Rules of Construction.

MONMOUTH PARK ASS'N v. WALLIS IRON WORKS.

55 N. J. L. 132, 39 Am. St. 626. 1892.

Action to recover final payment under a building contract. Judgment for plaintiff, and the defendant prosecutes a writ of error to this court. * * *

DIXON, J. The first exception to be considered took its rise from the fact that the structure was not completed within the time limited by the contract, nor until ninety-four days after the expiration of a month's extension of that time. The defendant claimed a deduction, or set-off, of one hundred dollars for each day's delay.

The plaintiff met this claim by insisting that the clause in the contract mentioning the one hundred dollars per day is unintelligible, and therefore nugatory, because in its opening line it reads: "In case the said party of the first part shall.... to fully and entirely," etc., omitting any effective verb.

We agree, however, with the trial judge in thinking that the context shows the verb which should be supplied. It makes the one hundred dollars payable for each day that "the party of the first part shall be in default." This plainly indicates the verb "fail" as the omitted word, to be supplied as an equivalent for the expression "be in default."

The right of a court of law to read an instrument according to the obvious intention of the parties, in spite of clerical errors or omissions which can be corrected by perusing the instrument, is sufficiently vindicated by the decision of this court in Sisson v. Donnelly, 36 N. J. L. 432; see, also, Burchell v. Clark, 2 C. P. Div. 88.

Taking the clause thus perfected, the plaintiff urged that the

one hundred dollars a day was a penalty, and so the trial judge rules, requiring that the defendant should prove the actual damages, and be allowed only for what was proved. To this ruling the defendant excepted.

In determining whether a sum, which contracting parties have declared payable on default in performance of their contract, is to be deemed a penalty or liquidated damages, the general rule is that the agreement of the parties will be effectuated. Their agreement will, however, be ascertained by considering, not only particular words in their contract, but the whole scope of their bargain, including the subject to which it relates. If, on such consideration, it appears that they have provided for larger damages than the law permits, e. g., more than the legal rate for the non-payment of money, or that they have provided for the same damages on the breach of any one of several stipulations, when the loss resulting from such breaches clearly must differ in amount, or that they have named an excessive sum in a case where the real damages are certain or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award, under any of these conditions the sum designated is deemed a penalty. And, if it be doubtful on the whole agreement whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty, because the law favors mere indemnity. But when damages are to be sustained by the breach of a single stipulation, and they are uncertain in amount, and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages. These are the general principles laid down in the text-books and recognized in the judicial reports of this state: Cheddick v. Marsh, 21 N. J. L. 463; Whitefield v. Levy, 35 N. J. L. 149; Hoagland v. Segur, 38 N. J. L. 230; Lansing v. Dodd, 45 N. J. L. 525.

In the present case the default consists of the breach of a single covenant to complete the grand-stand, as described in the approved plans and specifications, within the time limited. It is plain that the loss to result from such a breach is not easily ascertainable. The magnitude and importance of the grand-stand may be inferred from its cost—one hundred and thirty-three thou-

sand dollars. It formed a necessary part of a very expensive enterprise. The structure was not one that could be said to have a definable rental value. Its worth depended upon the success of the entire venture. How far the non-completion of this edifice might affect that success, and what the profits or losses of the scheme would be, were topics for conjecture only. The conditions, therefore, seem to have been such as to justify the parties in settling for themselves the measure of compensation.

The stipulations of parties for specified damages, on the breach of a contract to build within a limited time, have frequently been enforced by the courts. In Fletcher v. Dycke, 2 Term Rep. 32, ten pounds per week for delay in finishing the parish church; in Duckworth v. Allison, 1 Mees. & W. 412, five pounds per week for delay in completing repairs of a warehouse; in Legge v. Harlock, 12 Q. B. 1015, one pound per day for delay in erecting a barn, wagon-shed, and granary; in Law v. Local Board of Redditch (1892), 1 Q.B.127, one hundred pounds and five pounds per week for delay in constructing sewerage works; in Ward v. Hudson River Building Co., 125 N. Y. 230, ten dollars a day for delay in erecting dwelling houses; and in Malone v. City of Philadelphia, 147 Pa. St. 416, fifty dollars a day for delay in completing a municipal bridge—were all deemed liquidated damages. Counsel has referred us to two cases of building contracts where a different conclusion was reached: Muldoon v. Lynch, 66 Cal. 536, and Clement v. Schuylkill River R. R. Co., 132 Pa. St. 445. In the former case a statutory rule prevailed, and in the latter the real damage was easily ascertainable, and the stipulated sum was unconscionable. In the case at bar we have no data for saying that one hundred dollars a day was unconscionable.

The sole question remaining on this exception, therefore, is whether the parties have agreed upon the sum named as liquidated damages.

Their language seems indisputably to have this meaning. They expressly declare the sum to be agreed upon as the damages which the defendant will suffer; they expressly deny that they mean it as a penalty, and they provide for its deduction and retention by the defendant in a mode which could be applied only if the sum be considered liquidated damages.

But it is argued that as the contract authorized the engineer

of the defendant to make any alterations or additions that he might find necessary during the progress of the structure, and required the plaintiff to accede thereto, it is unreasonable to suppose that the plaintiff could have intended to bind itself in liquidated damages for delay in completing such a changeable contract.

But this argument seems to be aside from the present inquiry, which is not whether the plaintiff became responsible for damages by reason of the non-completion of the grand-stand on the day named, but whether, if it did become so responsible, those damages are liquidated by the contract. On the question first stated, changes ordered by the engineer may afford matter for consideration; on the second question, they are irrelevant.

Certainly, the bills of exceptions do not indicate any alterations or additions which, as matter of law, would relieve the plaintiff from responsibility for the admitted delay, and consequently there may have been ground for considering the defendant's damages. If there was, the amount of the damages was adjusted by the contract at one hundred dollars per day.

We think the ruling at the circuit on this point was erroneous. * * *

Let the judgment be reversed, and a venire de novo be awarded.

Alternative Stipulations.

J. RANLETT SMITH v. FREDERICK W. A. BERGENGREN.

153 Mass. 236. 1891.

HOLMES, J. The defendant covenanted never to practice his profession in Gloucester so long as the plaintiff should be in practice there, provided, however, that he should have the right to do so at any time after five years by paying the plaintiff two thousand dollars, "but not otherwise." This sum of two thousand dollars was not liquidated damages, still less was it a penalty. It was not a sum to be paid in case the defendant broke his contract, and did what he had agreed not to do. It was a price fixed for what the contract permitted him to do if he paid. The defendant expressly covenanted not to return to practice in Gloucester unless he paid this price. It would be against com-

mon sense to say that he could avoid the effect of thus having named the sum by simply returning to practice without paying, and could escape for a less sum if the jury thought the damage done the plaintiff by his competition was less than two thousand dollars. The express covenant imported the further agreement that if the defendant did return to practice he would pay the price. No technical words are necessary if the intent is fairly to be gathered from the instrument. See Pearson v. Williams, 24 Wend. 244, and 26 Wend. 630; Stevinson's case, 1 Leon. 324; St. Albans v. Ellis, 16 East 352; Deverill v. Burnell, L. R. 8 C. P. 475; National Provincial Bank of England v. Marshall, 40 Ch. D. 112.

If the sum had been fixed as liquidated damages, the defendant would have been bound to pay it. Cushing v. Drew, 97 Mass. 445; Lynde v. Thompson, 2 Allen 456; Holbrook v. Tobey, 66 Maine 410. But this case falls within the language of Lord Mansfield in Lowe v. Peers, 4 Burr. 2225, 2229, that if there is a covenant not to plough with a penalty in a lease, a court of equity will relieve against the penalty, "but if it is worded 'to pay £5 an acre for every acre ploughed up,' there is no alternative, no room for any relief against it, no compensation; it is the substance of the agreement." See also Ropes v. Upton, 125 Mass. 258, 260. The ruling excepted to did the defendant no wrong. In the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

How the Question Is Solved.

JOSEPH LONGWORTH AND LARZ ANDERSON, EXECUTORS OF NICHOLAS LONGWORTH, DECEASED v. WILLIAM ASKREN, JAMES B. RICORDS ET AL.

15 O. St. 370. 1864.

This was an action originally brought in the superior court of Cincinnati for a balance claimed to be due upon a certain promissory note executed by James B. Ricords to the order of Nicholas Longworth, being for the purchase money of a certain lot of ground in the city of Cincinnati, sold and conveyed by Longworth to Ricords; and to foreclose a mortgage given upon

the same premises to secure the payment of the note. The note was as follows:

"Cincinnati, July 24, 1840.

"For value received, I promise to pay N. Longworth, or order, one thousand dollars, with interest yearly till paid, and payable as follows: in two, three, four, five, six, seven, eight, nine, and ten years, equal installments, with interest yearly, as aforesaid: being the contract price of a lot. But if each and every payment is made punctually as due, or before due, or within ten days after each is due, as an inducement to punctuality, two hundred dollars of the amount will be released, and eight hundred dollars and its yearly interest accepted in full payment, but not otherwise. James B. Ricords."

On September 8, 1841, Ricords sold and conveyed the lot, with the mortgage incumbrance upon it, to William Askren, who assumed the payment of the note given to Mr. Longworth for the purchase money, at which time nothing had been paid on account either of principal or interest. * * *

Askren made sundry payments; but by none of them did he bring himself within the terms of the contract as to time and amount. Before the ten years from the date of the note had expired, however, he had paid in the aggregate the full amount of eight hundred dollars with annual interest. He accordingly pleaded payment, and claimed that by the terms of the note, or contract, any excess over eight hundred dollars and interest was in the nature of a penalty, and prayed the court so to decree, and that the note and mortgage might be surrendered up to him and canceled.

Upon the hearing at special term, the court rendered a decree in favor of the defendant, finding "that the equity of the case is with the defendants; that the note described in the plaintiff's petition secured by the mortgage therein described, has been paid in full by the defendant, William Askren, on the 12th day of October, A. D. 1849, and that said mortgage ought to be canceled by the plaintiff."

A motion for a new trial was thereupon made by the plaintiff, and afterward reserved for the decision of all the judges in general term, and the cause coming on upon the reservation, the motion was overruled and the judgment and finding at

special term affirmed, and thereupon a final judgment and entry was made in general term, to reverse which this petition in error is prosecuted.

WHITE, J. This case presents the single legal question, whether, upon the true construction of the mortgage note sued on, the one thousand dollars, therein mentioned, is to be regarded as a penalty. If that be its character, the judgment of the superior court should be affirmed; otherwise, it should be reversed.

This is not the case of an agreement for the composition of a subsisting, independent indebtedness. The instrument in question creates the only debt on which the plaintiff relies for a recovery. Nor can the claim, made by plaintiff's counsel, be supported, that the stipulation for the discharge of the obligation by the punctual payment of eight hundred dollars in installments, is a privilege given to the payer, and inserted for his exclusive benefit. This claim is based on the assumption that the thousand dollars was the sole consideration for the lot, and, consequently, is the amount of the actual debt. But it is as fair to presume that the omission of the stipulation in regard to the eight hundred dollars would have defeated the sale, as that the insertion of the thousand dollars secured it.

The transaction was the sale of the lot; and the instrument in question contains the terms upon which it was made. All the stipulations on the part of Ricords are supported by the same identical consideration. It is not to be presumed that the sale would have been concluded had any of the terms actually agreed to been omitted; and, as the terms of the sale were satisfactory to the parties, the presumption is that they were acquiesced in, not as a special favor to either, but for the mutual benefit of both.

Nor, in our view, does the order in which the sums are stated change their character, or the legal effect of the instrument; for, whether the amount to be paid is to be reduced upon compliance with the terms of payment, or to be increased on a default, is only a different mode of expressing the same thing.

All that the plaintiff, at the time of making the contract, had a right to expect, was the payment of eight hundred dollars with the interest, in the installments and at the times stipulated.

These payments Ricords had promised to make punctually. A default occurred; and, in such a contract, in our opinion, interest is to be regarded as a compensation for the injury caused by the delay. All beyond must be regarded either as penalty or liquidated damages; but under neither form can the plaintiff be allowed to recover more than what the law deems adequate compensation for the breach.

It is to be noted that the only evidence of the terms of sale is what appears from the instrument itself. There is nothing to show that the contract for the purchase of the lot was originally made, in fact, at a thousand dollars; and that the remission of the contract price to eight hundred dollars was the gratuitous act of the vendor. If the abatement stood on this footing, it would devolve on the party seeking its benefit to show that he had complied with the conditions upon which it was offered.

The payment of the first annual installment of interest, and the receipt given therefor, by the plaintiff's testator, show that, at that time, the parties gave the foregoing construction to the note, and regarded the eight hundred dollars as the principal debt. In this receipt, the year's interest, due July 24, 1841, is stated to be $48.00—being the interest on $800.00, for one year, at six per cent.

The numerous installments provided for differed materially in importance. The first was a year's interest on the principal; the next was a like sum with one-ninth of the principal; and, from that time forward, the payments would diminish—the last one consisting of one-ninth of the principal, and the interest thereon for the last preceding year. Upon the terms of the instrument, the consequence of a default in either would be to increase the liability of the debtor in a sum equal to two hundred dollars and the interest thereon, for the ten years the note was to run. This would be so manifestly unreasonable that we can regard the thousand dollars only in the light of a penalty inserted and meant to be held in terrorem for the purpose of stimulating the debtor to promptitude in payment.

The judgment will be affirmed.

CHAPTER III.

EXEMPLARY DAMAGES.

KURTZ v. FRANK.

76 Ind. 594. 1881.

WOODS, J. Action by the appellee against the appellant for a breach of marriage contract. The suit was commenced in the Wabash circuit court, and removed thence, on an application for a change of venue, to Miami county, where there was a verdict and judgment for the plaintiff for three thousand dollars. The questions presented for decision arise upon the motion for a new trial, the overruling of which is assigned as error. * * *

The jury were instructed that if the contract and the breach of it had been proved, and if from the evidence they believed that the element of fraud and deceit mingled in the controversy as an ingredient in the conduct of the defendant, either in making the contract or in breaking it, they might allow exemplary damages. The abstract correctness of the doctrine so enunciated is not denied, but it is insisted that there was no evidence of fraud or deceit, and that the instruction was therefore inapplicable and calculated to mislead. Fraud may be inferred from conduct and circumstances, though there be no direct proof; and upon the evidence in this case we cannot say that the court was not justified in submitting the matter to the jury, as it was done in this charge. The seduction of the appellee by the appellant was clearly proved, and the inference may not be said to be entirely unwarranted that seduction, and not marriage, was the original and persistent design of the defendant. There is no similarity between the proof in this case and that in the case of Dryden v. Knowles, 33 Ind. 148, which the counsel for appellant have cited. That punitive damages may be allowed for breach of promise to marry, see Johnson v. Jenkins, 24 N. Y. 252; Thorn v. Knapp, 42 N. Y. 474; Simpson v. Black, 27 Wis. 206; Dryden v. Knowles, supra. * * *

Exemplary or Vindictive Damages.

AUSTIN ET UX v. WILSON ET UX.

4 Cush. 273, 50 Am. D. 766.

Case for a libel by the female defendant. The judge instructed the jury, in substance, that vindictive damages were not recoverable in this case, but that the damages, if any, must be limited to compensation for the injury. Verdict for the plaintiffs for thirty dollars, and the plaintiffs excepted. * * *

METCALF, J. We are of opinion that the jury were rightly instructed that the damages in this case must be limited to a compensation for the injury received. Whether exemplary, vindictive, or punitive damages—that is, damages beyond a compensation or satisfaction for the plaintiff's injury—can ever be legally awarded as an example to deter others from committing a similar injury, or as a puinshment of the defendant for his malignity or wanton violation of social duty, in committing the injury which is the subject of the suit, is a question upon which we are not now required nor disposed to express an opinion. The arguments and the authorities on both sides of this question are to be found in 2 Greenl. Ev., tit. Damages, and Sedgwick on Damages, 39 et seq. If such damages are ever recoverable, we are clearly of opinion that they cannot be recovered in an action for an injury which is also punishable by indictment, as libel and assault and battery. If they could be the defendant might be punished twice for the same act. We decide the present case on this single ground. See Thorley v. Lord Kerry, 4 Taunt. 355; Whitney v. Hitchcock, 4 Den. 461; Taylor v. Carpenter, 2 Woodb. & M. 1, 22.

We do not hold that smaller damages ought to have been assessed in this case than would have been legally recoverable if the libel had been published by the wife while sole, and the action had been against her alone. A husband is liable for his wife's acts, when liable at all, to the same extent as if she alone were answerable.

Exceptions overruled.

CHAPTER IV.

DIRECT AND CONSEQUENTIAL DAMAGES.

Breach of Contract.

HADLEY v. BAXENDALE.

Exchequer, 1854. 9 Ex. 341 (Eng.).

This was an action by the plaintiffs, owners of a steam grist-mill, against the defendant, a carrier, for delay in delivering two pieces of iron, being the broken shaft of the mill of the plaintiffs, by reason of which delay the engineer to whom they were to be delivered was unable to supply a new shaft, and the mill of the plaintiffs was stopped, and the plaintiffs lost certain profits by the delay of their business, which was laid in the declaration as special damage. The defendant paid £25 into court.

At the trial, before Crompton, J., at the Summer Assizes for Gloucester, 1853, it appeared that the broken shaft was to be sent to the engineer as a model for a new one, and at the time of the contract for the carriage being made, the defendant's clerk was informed that the mill was stopped and that the shaft must be sent immediately. It further appeared that its delivery at its destination was delayed for several days, and, consequently, the plaintiffs did not receive the new shaft back as they expected, and their mill was kept idle. The learned judge left the question of damages to the jury, although it was objected that the special damage was too remote, and they gave a verdict for the plaintiffs for £25 beyond the sum paid into court.

A rule nisi for a new trial for misdirection was obtained in Michaelmas term, on the ground that the learned judge ought to have told the jury to throw out of their consideration the alleged special damage. * * *

ALDERSON, B. We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the judge, at the

next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The courts have done this on several occasions; and, in Blake v. Midland Railway Company, 21 L. J., Q. B., 237, the court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at Nisi Prius.

"There are certain established rules," this court says, in Alder v. Keighley, 15 M. & W. 117, "according to which the jury ought to find." And the court, in that case, adds: "and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advan-

tage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions to this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows,

therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Rule absolute.

CHAPTER V.

ENTIRE DAMAGES IN ONE ACTION.

When More Than One Action.

SUSANNA HOLMES v. WILSON AND TWO OTHERS.

10 A. & E. 503 (Eng.). 1837.

In this case the trustees of a turnpike company built buttresses to support the turnpike on the land of plaintiff, without plaintiff's consent. For this trespass plaintiff sued defendant for damages. Thereupon defendant paid into court twenty-five pounds, the full amount of damages that plaintiff had sustained, by reason of said trespass, and plaintiff afterwards on Feb. 3rd, 1837, received this amount in full satisfaction for the action she had begun.

* * * On the 13th of February, 1837, the plaintiff caused a notice to be served on defendants, requiring them, within twelve days, to remove the buttresses erected upon her land, and giving notice that, if they did not do so, an action would be brought for continuing the buttresses on the land, and further actions from time to time until compliance with the requisition. The trustees, considering that the buttresses were necessary to support the road, and that the former payment by them was an equivalent for the permanent use of the land, refused to remove them. On the 27th of April following, the present action was commenced. It was not shewn that the defendants, or any of them, had entered upon the land of the plaintiff, or had done any act upon it since the trespasses complained of in the first action (a). One of them (the contractor) had entered into an agreement with another of the defendants (the trustee) in 1836 to keep the road in repair for two years. On the part of the defendants it was contended that the action was improperly conceived in trespass, that, by force of the local act and of the General Turnpike Act, 3 G. 4. c. 126. s. 147, the plaintiff was barred of her action after three months from the

date of the original trespass; and that the damages recovered in the former action were to be regarded as a full compensation for all injury occasioned by the buttresses, or as a "satisfaction out and out." The learned Baron nonsuited the plaintiff, reserving liberty to move to enter a verdict for her with nominal damages.

* * * * * * * * *

Alexander now shewed cause. The proper form of action, if any will lie, is case, and not trespass. In Lawrence v. Obee (a) Lord Ellenborough was of that opinion, and there is no authority to shew that a mere continuance is a trespass. * * * But, at all events, the former recovery is a complete bar; the damages given on the first action must be considered as the full estimated value of the land thus permanently occupied by the buttresses. The damages were in respect of prospective as well as past injury; the judgment operated as a purchase of the land. (Lord Denman, C. J. If the property was changed, why did you not put in a plea to that effect?) It was needless to raise that question. The plea states a fact, which either shews a transfer of the property, or, at all events, precludes any further action for a trespass upon it. (Patteson, J. How can you convert the recovery, and payment of damages for the trespass, into a purchase? A recovery of damages for a nuisance to land will not prevent another action for continuing it.)

No act is shewn to have been done since the former recovery. The defendants have no right to enter the plaintiff's land, without her leave, in order to remove the nuisance; so that, unless the plaintiff removes it herself, the defendants will be exposed to continual actions, or be obliged to commit a further trespass by entering to remove it. * * *

Lord Denman, C. J. The defendants are clearly not within the protection of either statute (d). Then, the former and the present action are for different trespasses. The former was for erecting the buttresses. This action is for continuing the buttresses so erected. The continued use of the buttresses for the support of the road, under such circumstances, was a fresh trespass.

Littledale, Patteson, and Williams Js. concurred.

Rule absolute to enter a verdict for the plaintiff (a).

Question Arises in Different Ways.

WILLIAMS v. POMEROY COAL COMPANY.

37 O. St. 583.

* * * WHITE, J. The decision of this case depends upon what constituted the cause of action against the defendant, and when it accrued. The claim of the plaintiff is that the cause of action consists of a private nuisance caused by the excavation made by the defendant on lot 1223 when removing the coal under his lease from the south half of lot 1222, and that the cause of action is a continuing one and first accrued when the water from the abandoned mine flowed over into the mine of the plaintiff. On the other hand, the claim of the defendant is that the cause of action consisted of the trespass committed in making the excavation, and was completed when the work was done and the mine abandoned. In the first place, it may be observed that this is not a case where the defendant has wrongfully entered upon the lands of the plaintiff and erected and maintained structures thereon. Nor is it a case where structures have been erected and maintained on the lands of the defendant or of another, to the nuisance or injury of the plaintiff's premises. In these cases the wrong may, by the lapse of time, ripen into a right under the statute of limitations or by prescription. In speaking to this point in Clegg v. Dearden, 12 Ad. & Ellis, N. S. 601, Lord Denman uses the following language: "The gist of the action, as stated in the declaration, is the keeping open and unfilled up an aperture and excavation made by the defendant into the plaintiff's mine. By the custom, the defendant was entitled to excavate up to the boundary of his mine, without leaving any barrier, and the cause of action, therefore, is the not filling up the excavation made by him on the plaintiff's side of the boundary and within their mine. It is not, as in the case of Holmes v. Wilson, 10 A. & E. 503, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiff; nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiff, as in the case of Thompson v. Gibson, 7 Mees. & W. 456. There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation

upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damage for the loss sustained. The defendant, having made an excavation and aperture in the plaintiff's land, was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation. Such an omission is neither a continuation of a trespass, nor a nuisance; nor is it a breach of any legal duty."

The defendant in the present case had no estate or interest in lot 1222 further than the right to mine the coal therefrom. This he accomplished in 1862, and surrendered the premises. He had no authority from the owner of the fee, nor from Horton, his immediate lessor, to mine over into lot 1223; and at the time of the flowage of water from the abandoned mine into the mine of the plaintiff, he had for more than five years ceased to have any interest in lot 1222 or any right of entry thereon.

If the claim of the defendant as to what constituted the cause of action is correct, the action clearly cannot be maintained. 1. For the reason that at the time of the commission of the trespass, the plaintiff was not the owner of the land upon which the trespass was committed; and, 2, if he had been such owner, the action would be barred by the statute of limitations.

There is no distinction in the application of the statute of limitations between trespasses under ground and upon the surface; nor whether the cause of action is known or unknown to the plaintiff within the time limited by the statute. Hawk v. Minnich, 19 Ohio St. 466; Hunter v. Gibbons, 1 Hurl. & Nor. 459.

The question therefore is, whether the defendant, in addition to the liability for the trespass, is also liable for creating and continuing a nuisance. If he is so liable a recovery for the trespass would be no bar to subsequent actions for continuing the nuisance.

In Stephen's Commentaries (vol. 3, 499), a private nuisance is defined to be "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another, and not amounting to a trespass."

Here the only thing done by the defendant was the making

of the excavation upon the plaintiff's land, which did amount to a trespass.

Plaintiff's counsel claim that the action is brought to recover consequential damages resulting from the wrongful acts of the defendant. Be it so. But with what wrongful acts is the defendant chargeable except those constituting the trespass? We see none. And a recovery for the trespass or the bar of an action brought for it, is a bar to a recovery for the consequences resulting from such trespass. True, this is not the ground upon which the jury were charged, but the error in the charge was in favor of the plaintiff, and is no ground for reversal.

Judgment affirmed.

CHAPTER VI.

MENTAL SUFFERING AND FRIGHT.

Recovery in Cases of Injury Without Personal Impact.

WILKINSON v. DOWNTON.

2 Q. B. 57 (Eng.). 1897.

WRIGHT, J. In this case the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.

The real question is as to the £100, the greatest part of which is given as compensation for the female plaintiff's illness and suffering. It was argued for her that she is entitled to recover this as being damage caused by fraud, and therefore within the doctrine established by Pasley v. Freeman[1] and Langridge v. Levy.[2] I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injuria of that kind. I

[1] (1789) 3 T. R. 51.
[2] (1837) 2 M. & W. 519.

think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, willfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition, without more, appears to me to state a good cause of action, there being no justification alleged for the act. This willful injuria is in law malicious, although no malicious purpose to cause the harm which was caused, nor any motive of spite, is imputed to the defendant.

It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be regarded in law as a consequence for which the defendant is answerable. Apart from authority, I should give the same answer and on the same ground as the last question, and say that it was not too remote. * * *

In Smith v. Johnson & Co., unreported, decided in January last, Bruce, J., and I held that where a man was killed in the sight of a plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock from fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence. But that was a very different case from the present.

There must be judgment for the plaintiff, £100 1s 10½d.

CHAPTER VII.

AVOIDABLE CONSEQUENCES.

Injuries to Property.

SUTHERLAND v. WYER.

67 Maine 64. 1877.

VIRGIN, J. The plaintiff contracted with the defendants to play first old man and character business at the Portland Museum, and to do all things requisite and necessary to any and all performances which the defendants "shall designate, and to conform strictly to all the rules and regulations of said theatre," for thirty-six weeks, commencing on Sept. 6, 1875, at thirty-five dollars per week; and the defendants agreed "to pay him thirty-five dollars for every week of public theatrical representations during said season." By one of the rules mentioned, the defendants "reserved the right to discharge any person who may have imposed on them by engaging for a position which, in their judgment, he is incompetent to fill properly."

The plaintiff entered upon his service under the contract, at the time mentioned therein, and continued to perform the theatrical characterizations assigned to him, without suggestion of incompetency, and to receive the stipulated weekly salary, until the end of the eighteenth week, when he was discharged by the defendants, as they contended before the jury, for incompetency under the rule; but, as the plaintiff there contended, for the reason that he declined to accept twenty-four dollars per week during the remainder of his term of service.

Three days after his discharge, and before the expiration of the nineteenth week, the plaintiff commenced this action to recover damages for the defendants' breach of the contract. The action was not premature. The contract was entire and indivisible. The performance of it had been commenced, and the plaintiff been discharged and thereby been prevented from the further execution of it; and the action was not brought until

after the discharge and consequent breach. Howard v. Daly, 61 N. Y. 362, and cases; Dugan v. Anderson, 36 Md. 567, and cases. The doctrine of Daniels v. Newton, 114 Mass. 530, is not opposed to this. Neither do the defendants insist that the action was prematurely commenced; but they contend that the verdict should be set aside as being against the weight of evidence.

The verdict was for the plaintiff. The jury must, therefore, have found the real cause of his discharge to be his refusal to consent to the proposed reduction of his salary. The evidence on this point was quite conflicting. Considering that all the company were notified, at the same time, that their respective salaries would be reduced one-third, without assigning any such cause as incompetency; that no suggestion of the plaintiff's incompetency was ever made to him prior to his discharge; and that his written discharge was equally silent upon that subject, we fail to find sufficient reason for disturbing the verdict upon this ground of the motion, especially since the jury might well find as they did on this branch of the case, provided they believed the testimony in behalf of the plaintiff.

There are several classes of cases founded both in tort and in contract, wherein the plaintiff is entitled to recover, not only the damages actually sustained when the action was commenced, or at the time of the trial, but also whatever the evidence proves he will be likely to suffer thereafter from the same cause. Among the torts coming within this rule are personal injuries caused by the wrongful acts or negligence of others. The injury continuing beyond the time of trial, the future as well as the past is to be considered, since no other action can be maintained. So in cases of contract the performance of which is to extend through a period of time which has not elapsed when the breach is made and the action brought therefor and the trial had. Remelu v. Hall, 31 Vt. 582. Among these are actions on bonds or unsealed contracts stipulating for the support of persons during their natural life. Sibley v. Rider, 54 Maine 463; Philbrook v. Burgess, 52 Maine 271.

The contract in controversy falls within the same rule. Although, as practically construed by the parties, the salary was payable weekly, still, when the plaintiff was peremptorily discharged from all further service during the remainder of the

season, such discharge conferred upon him the right to treat the contract as entirely at an end, and to bring his action to recover damages for the breach. In such action he is entitled to a just recompense for the actual injury sustained by the illegal discharge. Prima facie, such recompense would be the stipulated wages for the remaining eighteen weeks. This, however, would not necessarily be the sum which he would be entitled to; for, in cases of contract as well as of tort, it is generally incumbent upon an injured party to do whatever he reasonably can, and to improve all reasonable and proper opportunities to lessen the injury. Miller v. Mariners' Church, 7 Maine 51, 56; Jones v. Jones, 4 Md. 609; 2 Greenl. Ev., par. 261, and notes; Chamberlin v. Morgan, 68 Pa. St. 168; Sedg. on Dam. (6th Ed.) 416, 417, cases supra.

The plaintiff could not be justified in lying idle after the breach; but he was bound to use ordinary diligence in securing employment elsewhere during the remainder of the term, and whatever sum he actually earned or might have earned by the use of reasonable diligence, should be deducted from the amount of the unpaid stipulated wages. And this balance, with interest thereon, should be the amount of the verdict. Applying the rule mentioned, the verdict will be found too large.

By the plaintiff's own testimony, he received only $60 from all sources after his discharge—$25 in February and $35 from the 10th to the 20th of April, at Booth's. His last engagement was for eight weeks, commencing April 10th, which he abandoned on the 20th, thus voluntarily omitting an opportunity to earn $57, prior to the expiration of his engagement with the defendants, when the law required him to improve such an opportunity, if reasonable and proper. We think he should have continued the last engagement until May 6, instead of abandoning it and urging a trial in April, especially inasmuch as he could have obtained a trial in May just as well. The instructions taken together were as favorable to the defendants as they were entitled to.

If, therefore, the plaintiff will remit $57, he may have judgment for the balance of the verdict; otherwise the entry must be verdict set aside and new trial granted.

Appleton, C. J., Dickerson, Barrows, Danforth, and Libbey, JJ., concurred.

Where Plaintiff Proceeds with the Contract After Defendant Has Given Notice to Stop.

CLARK v. MARSIGLIA.

1 Denio 317 (N. Y.). 1845.

Error from the New York common pleas. Marsiglia sued Clark in the court below in assumpsit, for work, labor, and materials, in cleaning, repairing, and improving sundry paintings belonging to the defendant. The defendant pleaded non assumpsit.

The plaintiff proved that a number of paintings were delivered to him by the defendant to clean and repair, at certain prices for each. They were delivered upon two occasions. As to the first parcel, for the repairing of which the price was seventy-five dollars, no defense was offered. In respect to the other, for which the plaintiff charged one hundred and fifty-six dollars, the defendant gave evidence tending to show that after the plaintiff had commenced work upon them he desired him not to go on, as he had concluded not to have the work done. The plaintiff, notwithstanding, finished the cleaning and repairing of the pictures, and claimed to recover for doing the whole and for the materials furnished, insisting that the defendant had no right to countermand the order which he had given. The defendant's counsel requested the court to charge that he had the right to countermand his instructions for the work, and that the plaintiff could not recover for any work done after such countermand.

The court declined to charge as requested, but, on the contrary, instructed the jury that inasmuch as the plaintiff had commenced the work before the order was revoked, he had a right to finish it, and to recover the whole value of his labor and for the materials furnished. The jury found their verdict accordingly, and the defendant's counsel excepted. Judgment was rendered upon the verdict.

PER CURIAM. The question does not arise as to the right of the defendant below to take away these pictures, upon which the plaintiff had performed some labor, without payment for what he had done, and his damages for the violation of the

contract, and upon that point we express no opinion. The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.

To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed can not persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but, upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith towards the employer. The judgment must be reversed, and a venire de novo awarded.

Judgment reversed.

Anticipatory Breach.

MISSOURI FURNACE CO. v. COCHRAN, ADM'X, ETC.

8 Fed. 463.

ACHESON, D. J. This suit, brought February 26, 1880, was to recover damages for the breach by John M. Cochran of a contract for the sale and delivery by him to the plaintiff of

36,621 tons of standard Connellsville coke, at the price of $1.20 per ton (subject to an advance in case of a rise in wages) deliverable on cars at his works, at the rate of nine cars of 13 tons each per day on each working day during the year 1880. After 3,765 tons were delivered, Cochran, on February 13, 1880, notified the plaintiff that he had rescinded the contract, and thereafter delivered no coke. After Cochran's refusal further to deliver coke, the plaintiff made a substantially similar contract with one Hutchinson for the delivery during the balance of the year of 29,587 tons of Connellsville coke at four dollars per ton, which was the market rate for such a forward contract, and rather below the market price for present deliveries on February 27, 1880, the date of the Hutchinson contract. The plaintiff claimed to recover the difference between the price stipulated in the contract sued on, and the price which the plaintiff agreed to pay Hutchinson under the contract of February 27, 1880. But the court refused to adopt this standard of damages, and instructed the jury that the plaintiff was "entitled to recover, upon the coke which John M. Cochran contracted to deliver and refused to deliver to the plaintiff, the sum of the difference between the contract price—that is, the price Cochran was to receive—and the market price of standard Connellsville coke, at the place of delivery, at the several dates when the several deliveries should have been made under the contract." Under this instruction there was a verdict for the plaintiff for $22,171.49. As the plaintiff had in its hands $1,521.10 coming to the defendant for coke delivered, the damages as found by the jury amounted to the sum of $23,692.50.

The plaintiff moved the court for a new trial; and, in support of the motion, an earnest and certainly very able argument has been made by plaintiff's counsel. But we are not convinced that the instruction complained of was erroneous.

Undoubtedly it is well settled, as a general rule, that when contracts for the sale of chattels are broken by the vendor failing to deliver, the measure of damages is the difference between the contract price and the market value of the article at the time it should be delivered. Sedgwick on the Measure of Damages (7th Ed.), 552. In Shepherd v. Hampton, 3 Wheat. 200, this rule was distinctly sanctioned. Chief Justice Marshall there says: "The unanimous opinion of the court is that the price of the

article at the time it was to be delivered is the measure of damages." Id. 204. Nor does the case of Hopkins v. Lee, 6 Wheat. 118, promulgate a different doctrine; for, clearly, "the time of the breach" there spoken of is the time when delivery should have been made under the contract.

It is said in Sedgwick on the Measure of Damages (7th Ed.), 558, note b: "Where delivery is required to be made by installments, the measure of damages will be estimated by the value at the time each delivery should have been made." In accordance with this principle the damages were assessed in Brown v. Muller, Law Rep. 7 Ex. 319, and Roper v. Johnson, Law Rep. 8 C. P. 167, which were suits by vendee against vendor for damages for failure to deliver iron, in the one case, and coal, in the other, deliverable in monthly installments. In one of these cases suit was brought after the contract period had expired; in the other case before its expiration; but in both cases the vendor had given notice to the plaintiff that he did not intend to fulfil his contract. To the argument, there urged on behalf of the vendor, that upon receiving such notice it is the duty of the vendee to go into the market and provide himself with a new forward contract, Kelly, C. B., in Brown v. Muller, said:

"He is not bound to enter into such a contract, which might be to his advantage or detriment, according as the market might fall or rise. If it fell, the defendant might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand."

Where the breach is on the part of the vendee, it seems to be settled law that he cannot have the damages assessed as of the date of his notice that he will not accept the goods. Sedgwick on Measure of Damages, 601. The date at which the contract is considered to have been broken by the buyer is that at which the goods were to have been delivered, not that at which he may give notice that he intends to break the contract. Benjamin on Sales, § 759. And, indeed, it is a most rational doctrine that a party, whether vendor or vendee, may stand upon his contract and disregard a notice from the other party of any intended repudiation of it. If this were not so, the party desiring to be off from a contract might choose his own time to discharge himself from further liability.

The law as to the effect of such notice is clearly and most satisfactorily stated by Cockburn, C. J., in Frost v. Knight, Law Rep. 7 Ex., 112.

"The promisee, if he pleases, may treat the notice of intention as inoperative, and wait the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him to decline to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

We do not think the force of the English cases referred to has been at all weakened by that of the Dunkirk Colliery v. Lever, 41 Law Times Rep. (U. S.) 632, so much relied on by the plaintiff's counsel. Nor are the facts of that case similar to those of the case in hand. There the controlling fact was that, at the time the vendee definitely refused to accept, there was no regular market for cannel coal, and the vendors resold as soon as they found a purchaser according to the ordinary course of their business, and without unreasonable delay. Therefore, it was held that the plaintiffs were entitled to the full amount of the difference between the contract price and that which they obtained.

Our attention has been called to Masterton v. Brooklyn, 7 Hill 61. Undoubtedly this is a leading case in this branch of the law, and especially upon the subject of the profits allowable as damages, and the principles upon which they are to be ascertained. The suit, however, was upon a contract to procure, manufacture, and deliver marble for a building, and involved an investigation into the constituent elements of the cost to which

the contractor might have been subjected had the contract been carried out, such as the price of rough material in the quarry, expenses of dressing, etc. Upon the question as to the time at which the cost of labor and materials was to be estimated, the court was divided, and I do not find that the views of the majority upon this precise point have been followed. The case, however, lacked the element of market value (*Id.* 70), and as Judge Nelson cited with approbation Boorman v. Nash, 9 Barn. & C. 145, and Leigh v. Paterson, 8 Taunt. 540, it cannot be supposed that the court intended, in a case of marketable article having a market value, to sanction the principle contended for here.

I see nothing in the present case to distinguish it from the ordinary case of a breach by the vendor of a forward contract to supply a manufacturer with an article necessary to his business. For such breach, what is the true measure of damages? Says Kelly, C. B., in Brown v. Muller: "The proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed." That result—which is compensation—is secured, it seems to me, by the rule given to the jury here, unless the case is exceptional. The vendee's real loss, if delivery is to be made at one time or in installments, ordinarily is the difference between the contract price and the market value at the times the goods should be delivered. If, however, the article is of limited production, and cannot, for that or other reason, be obtained in the market, and the vendee suffers damage beyond that difference, the measure of damages may be the actual loss he sustains. McHose v. Fulmer, 73 Pa. St. 367; Richardson v. Chynoweth, 26 Wis. 656; Sedgwick on Damages, 554. With this qualification to meet exceptional cases, the rule that the damages are to be assessed with reference to the times the contract should be performed, furnishes, I think, a safe and just standard from which it would be hazardous to depart.

In this case I fail to perceive anything to call for a departure from that standard. There was no evidence of any special damage to the plaintiff by the stoppage of its furnaces or otherwise. Furthermore, the contract with Hutchinson, February 27, 1880, was made at a time when the coke market was excited and in an extraordinary condition. Unexpectedly and suddenly coke had risen to the unprecedented price of four dollars per ton;

but this rate was of brief duration. The market declined about May 1, 1880, and by the middle of that month the price had fallen to one dollar and thirty cents per ton. The good faith of the plaintiff in entering into the new contract cannot be questioned, but it proved a most unfortunate venture. By the last of May the plaintiff had in its hands more coke than was required in its business, and it procured—at what precise loss does not clearly appear—the cancellation of contracts with Hutchinson to the extent of 20,000 tons. As the plaintiff was not bound to enter into the new forward contract, it seems to me it did so at its own risk, and cannot fairly claim that the damages chargeable against the defendant shall be assessed on the basis of that contract.

The motion for a new trial is denied.

CHAPTER VIII.

VALUE.

Where There Is No Market Value of Property.

BOOM COMPANY v. PATTERSON.

98 U. S. 403.

FIELD, J. * * * The defendant in error, Patterson, was the owner in fee of an entire island and parts of two other islands in the Mississippi River above the Falls of St. Anthony, in the county of Anoka, in Minnesota. These islands formed a line of shore, with occasional breaks, for nearly a mile parallel with the west bank of the river, and distant from it about one-eighth of a mile. The land owned by him amounted to a little over thirty-four acres, and embraced the entire line of shore of the three islands with the exception of about three rods. The position of the islands specially fitted them, in connection with the west bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty millions of feet of logs. All that was required to form a boom a mile in length and one-eighth of a mile in width was to connect the islands with each other, and the lower end of the island farthest down the river with the west bank; and this connection could be readily made by boom sticks and piers.

The land on these islands owned by the defendant in error the company sought to condemn for its uses; and upon its application commissioners were appointed by the District Court to appraise its value. They awarded to the owner the sum of $3,000. The company and the owner both appealed from this award. * * *

In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such

cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.

We do not understand that all persons except the plaintiff in error were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. * * *

The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned. The contention on the part

of the plaintiff in error is, that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons, by reason of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the company the owner is deprived of the value which the lands, by their adaptability for boom purposes, previously possessed, and therefore should not now receive anything from the company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the company, lost this element of value in his property.

The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in the several cases cited by counsel. Thus, In the Matter of Furman Street, 17 Wend. 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the city of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was, "What is the value of the property for the most advantageous uses to which it may be applied?" In Goodwin v. Cincinnati & Whitewater Canal Co., 18 Oh. St. 169, where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or for any other particular use, but generally for any and all uses for which it might be suitable. And in Young v. Harrison, 17 Ga. 30, where land necessary for an abutment of a bridge was appropriated, the Supreme Court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. Its value as a bridge site was, therefore, allowed in the estimate of compensation to be awarded to the owner.

Judgment affirmed.

Proof of Value.

O'HANLAN v. GREAT WESTERN RAILWAY.

Queen's Bench (1865), 6 B. & S. 484 (Eng.).

BLACKBURN, J. The case has been fully discussed, and we are of opinion that the rule should be discharged. The leave reserved was to enter the verdict for the defendants, if there was no evidence on which the jury could reasonably find more damages than £22, which had been brought into court. The goods originally cost at Leeds, cash down, £20, the price in the invoice being £20 10s. 9d. They were sent, by the defendants' railway, to Neath, where they ought to have arrived early in November, but they were lost. It was agreed in the course of the argument that the rule laid down in Rice v. Baxendale, 7 N. & H. 96, applies to the present case, viz., that setting aside all special damage the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner. Now the value of the goods at the place of delivery must be the market price, if there is a market there for such goods: if there is not, either from the smallness of the place or the scarceness of the particular goods, the value at the place and time of delivery would have to be ascertained as a fact by the jury, taking into consideration various matters, including, in addition to the cost price and expenses of transit, the reasonable profits of the importer, which are adjusted by what is called the higgling and bargaining of the market. Neath was a place where there was no market for such goods as these, and the jury were therefore to take into consideration these elements. Where there is a market for goods of a particular description and they are actually sold, the price at which an importer sells them is regulated by his own average costs and charges, together with his average profit. For instance, the value of cotton at Liverpool, upon an average, exceeds the value of cotton in the Southern States of North America together with the freight, costs, and charges attendant upon its transport, otherwise no person would import it. The importer's profit, therefore, is an element in the market price of goods. Where there is no market from the nature of the thing no

evidence of what the importer's profit is can well be given, and the jury must say what is the fair and reasonable profit which persons in the ordinary course of business would be likely to make. In the present case there was an intelligent jury, consisting of men of business in Glamorganshire, who would know what were the profits of persons who brought goods from a manufacturing district to a town in Wales. The defendants paid into court a sum calculated at something less than 10 per cent on the cost price to cover interest, expenses, and everything else. The question reserved is, were the jury warranted in giving the plaintiff more? The jury have found £25 damages. I think they were very liberal in doing so, but I cannot say they were wrong.

CHAPTER IX.

INTEREST.

Interest as a Matter of Right.

WILSON v. CITY OF TROY.

135 N. Y. 96, 31 Am. St. Rep. 817.

This was an action by plaintiff Wilson to recover damages from defendant, caused by defendant's negligence in leaving open an excavation in one of its streets by reason of which plaintiff's horse was injured. One of the questions to be determined was whether plaintiff was entitled to interest on the amount of damages recovered, or whether the jury might exercise their discretion in allowing interest. Only that portion of the decision which relates to this subject is given:

O'BRIEN, J. * * * The amount demanded in the complaint on account of the injury to the horse was three thousand dollars, and the court instructed the jury that they could not, in awarding damages, go beyond that sum, with interest. The defendant's counsel excepted to this, in so far as it authorized interest, and requested the court to charge that the jury could not allow interest in the action. The court declined to so charge, and the defendant's counsel excepted. The jury afterwards came into court and announced that they had found a verdict for the plaintiff for three thousand dollars and interest. The court then said: "You must compute the interest, if you give interest; you will have to render your verdict in dollars and cents." This direction was complied with and the verdict as entered included interest from the date of the injury, which result has been modified by the general term, by striking out the interest awarded prior to the date of the presentation of the claim to the city, which was held to be a prerequisite to the maintenance of the action. The fair construction of the charge is, that the jury could include in the damages interest upon the sum found to rep-

resent the diminished value of the horse, in consequence of the injury, and not that the plaintiff was entitled to interest as matter of right. The exception, therefore, presents the question whether, in an action to recover damages to property by reason of negligence on the part of the defendant, it is within the power of the jury, in the exercise of discretion, to include in their award of damages interest on the sum found to represent the diminished value of the property in consequence of the injury from the time that the cause of action accrued. When interest may be allowed as part of the damages in actions of this character is a question which, in the present state of the law, is involved in much confusion and uncertainty, and in regard to which the decisions of the courts are not harmonious. It is perhaps impossible to formulate a general rule embracing every possible case. The tendency of courts in modern times has been to extend the right to recover interest on demand far beyond the limits within which that right was originally confined. What seemed to be the demands of justice did not permit the principle to remain stationary, and hence it has been for years in a state of constant evolution. This, in some measure, accounts for many of the apparently contradictory views to be found in the adjudged cases. There are certain fundamental principles, however, established by the decisions in this state, which, when properly applied, will aid in the solution of the question. There is, of course, a manifest distinction, always to be observed, between actions sounding in tort and actions upon contract. In the latter class of actions, there is not much difficulty in ascertaining the rule as to interest until we come to unliquidated demands. The rule in such cases has quite recently been examined in this court, and principles stated that will furnish a guide in most cases. White v. Miller, 78 N. Y. 393; 34 Am. Rep. 544.

We are concerned now only with the rule applicable in actions of tort. The right to interest, as a part of the damages, in actions of trover and trespass de bonis asportatis was given first in England by statute 3 and 4 William IV. The recovery was not, however, allowed by that statute as matter of right, but in the discretion of the jury. The earlier cases in this state followed the rule thus established in England and permitted the jury, in their discretion, to allow interest in such cases. Beals v. Guernsey, 8 Johns. 446; 5 Am. Dec. 348; Hyde v. Stone, 7 Wend.

354; 22 Am. Dec. 582; Bissell v. Hopkins, 4 Cow. 53; Rowley v. Gibbs, 14 Johns. 385.

The principle that the right to interest in such cases was in the discretion of the jury, was, however, gradually abandoned and now the rule is, that the plaintiff is entitled to interest on the value of property converted or lost to the owner by a trespass as matter of law. The reason given for the rule is, that interest is as necessary a part of a complete indemnity to the owner of the property as the value itself, and in fixing the damages, is not any more in the discretion of the jury than the value. Andrews v. Durant, 18 N. Y. 496; McCormick v. Pennsylvania C. R. R. Co., 49 N. Y. 315; Buffalo, etc., Co. v. Buffalo, 58 N. Y. 639; Parrott v. Knickerbocker, etc., Ice Co., 46 N. Y. 369. It is difficult to perceive any sound distinction between a case where the defendant converts or carries away the plaintiff's horse, and a case where, through negligence on his part, the horse is injured so as to be valueless There is no reason apparent for a different rule of damages in the one case than in the other. In an early case in this state, the principle was recognized that interest might be allowed, by way of damages, upon the sum lost by the plaintiff in consequence of defendant's negligence. Thomas v. Weed, 14 Johns. 255.

We think the rule is now settled in this state, that where the value of property is diminished by an injury wrongfully inflicted, the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury. That is the rule laid down in the elementary books and sustained by the adjudged cases. 1 Sedgwick on Damages, 8th ed., §§ 317, 320; Walrath v. Redfield, 18 N. Y. 457, 462; Mairs v. Manhattan R. E. Ass'n, 89 N. Y. 498; Duryee v. Mayor, etc., 96 N. Y. 477, 499; Home Ins. Co. v. Pennsylvania R. R. Co., 11 Hun, 182, 188; Moore v. New York, etc., R. R. Co., 126 N. Y. 671; Pennsylvania, etc., R. R. Co. v. Ziemer, 124 Pa. St. 560.

There is a class of actions sounding in tort in which interest is not allowable at all, such as assault and battery, slander, libel, seduction, false imprisonment, etc. There is another class in which the law gives interest on the loss as part of the damages, such as trover, trespass, replevin, etc. And still a third class, in which interest cannot be recovered as of right, but may

be allowed, in the discretion of the jury, according to the circumstances of the case. This action belongs to the latter class, and, as we have construed the charge as a direction that the jury might, in their discretion, allow interest on the diminished value of the horse, it was not erroneous.

Our attention has been called to the case of Sayre v. State, 123 N. Y. 291, and it is urged, upon the authority of that case, that interest cannot be allowed in any case for the recovery of unliquidated damages arising from negligence. We think that the case, when correctly understood, does not sustain the contention, but, in effect, holds the contrary. In that case a party appealed from the decision of the board of claims upon an award in his own favor, and the only question was whether, upon the evidence and findings, the claimant had been allowed all the damages that he was entitled to, and this court not only affirmed his right to all the damages that the board had awarded him, but increased the award from $3,000 to $8,136. The claim was based upon the negligent act of the state in overflowing the lands of the claimant, from which the damages claimed resulted. The board of claims allowed no interest, nor did this court. In adding to the award a sum of over five thousand dollars, this court acted in some sense as a court of original jurisdiction, and in making up the sum which was to constitute the final award, it refused to allow an item of interest claimed. Now, it is admitted that a court or jury charged with the duty of making up the amount of damages in such cases may refuse to allow interest, and that is precisely what this court did, and nothing more, and therefore the case is in harmony with the rule above stated, and with the cases from which we have deduced it. It is far from holding that it is error when, in such a case, the jury or the original court, after considering all the facts and circumstances bearing upon the loss, allows interest, in the exercise of discretion, as part of the indemnity to which the party is entitled. It simply recognized the rule that interest in such cases was not a matter of right, but of sound discretion, and held that the claimant was fully indemnified for his loss without adding interest. It is true that the learned judge who gave the opinion cited the cases arising upon contract in which it has been held that interest is not allowable, and remarked that he found no case justifying an allowance of interest. That was probably an

inadvertence, but the decision refusing interest was right, though the reasons may have been based upon a principle applicable to another class of actions. It must be remembered that the court was not reviewing any question decided below in regard to interest, but seeking to make up for itself a new award from the items of the claim appearing in the record, and whatever was said by way of argument, and as the reason for throwing out an item of interest on a sum claimed to have been expended in restoring or reclaiming the land, cannot be considered as the judgment of the court on the question now under consideration. That question was not noticed in the argument, and was not involved in the case except, perhaps, as a matter of discretion. For these reasons the judgment should be affirmed.

Interest as Compensation.

CHAPMAN AND ANOTHER v. THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY AND OTHERS.

26 Wis. 295.

Action by plaintiffs against defendants to recover damages for lumber belonging to the plaintiffs destroyed by fire caused by defendant's negligence.

DIXON, C. J. * * * The exception to the instruction that the jury should award interest from the time of the commencement of the action, upon such damage as they should find the plaintiffs had sustained, must also be overruled. The damage of the plaintiff was the value of the property destroyed. That value was readily ascertained. The amount or quantity of property destroyed being shown, the value was a matter of mere computation. It was, therefore, as if the court had instructed the jury that the damages of the plaintiffs would be the value of the property destroyed, with interest from the time of the commencement of the action. In trespass, trover, or replevin for the same property, taken or converted by the defendants, such would have been the legal rule of damages; or rather, the value with interest from the time of the taking or conversion. Why should not the same rule prevail in this

action? We are at a loss to assign any good reason for the distinction, if it can be said that it exists, or if it can be said to be in the discretion of the jury to give interest by way of damages in this case, whilst in the others they must give it as matter of strict legal right. We say we can see no good reason for the discrimination. The object of the rule, or of any rule of damages in any of the cases, is to give just and full compensation for losses actually sustained. It is obvious, regard being had to such compensation, which constitutes the foundation of the rule, that the giving of interest is as essential in this case as in any of the others. It is immaterial to the party who has lost his property, whether it has been taken and converted, or negligently destroyed by the other party. His loss is the same in either case, and in either case he should be entitled to the same compensation. It may be that the authorities do not fully sustain this rule. We are inclined to think they do not; and yet they do not establish the contrary. We find no case in which it has been held that such an instruction was erroneous; and the tendency of modern decisions would clearly appear to be to sustain it. At all events, we are willing to rest our decision upon the reason or principle, which it seems so apparent should govern in such cases. * * *

CHAPTER X.

LATERAL SUPPORT.

Lateral Support a Property Right.

McGUIRE v. GRANT.

1 Dutcher's Rep. 356 (N. J.).

* * * THE CHIEF JUSTICE. The first question submitted for consideration is, whether, upon the facts stated in the case certified, an action can be maintained by the plaintiff for the injury done to his land. The injury complained of consists in the settling and falling away of the plaintiff's land, in consequence of excavations made upon an adjoining lot. If the acts complained of were done with a malicious intent, or if the injury sustained by the plaintiff resulted from the careless and improper manner in which the work was executed, it is not denied that the plaintiff would be entitled to recover. The existence of improper motive, or of negligence or unskilfulness in the performance of the work, are questions of fact for a jury. Walters v. Pfeil, 1 Mood. & Mal. 362; Dodd v. Holme, 1 Ad. & E. 493; Panton v. Holland, 17 J. R. 92.

The case presents the simple inquiry, whether, in the absence of improper motive or negligence on the part of the defendant, the owner of land is entitled to recover for injuries sustained by the settling or falling away of his land, occasioned by excavations made on an adjoining lot. From the facts stated in the case, it must be assumed that the excavation was not made to an extraordinary or unusual depth; for although the excavation was made for the purpose of obtaining gravel, and was twenty feet below the surface of the plaintiff's lot, it was but two or three feet below the grade of Cooper street, upon which the lot in which the excavation was made fronted. It was not, therefore, a greater excavation than would be required for the ordinary purposes of building.

It is insisted, on the part of the defendant, that the maxim, "sic utere tuo ut alienum non lædas," applies, in its broadest signification, to the question under consideration, that while the owner of the land owns not only the surface of the soil, but above and below it to an indefinite extent, he is bound so to use and enjoy his own property as to occasion no injury to the property of others; and that, consequently, while excavating upon his own soil, he is answerable for every injury done to the buildings or land of an adjoining proprietor. The principle, it is certain, does not admit of so broad an application. There are many acts done in the exercise of individual rights which occasion loss to others, which nevertheless afford no subject of legal redress. The loss they occasion is, in the eye of the law, damnum absque injuria. The line which separates this class of acts from those which form the subjects of legal redress is often shadowy and indistinct. It rests frequently upon grounds of public policy, or upon the mere force of authority, rather than upon any clear or well defined principle.

It is well settled, that where the owner of a lot builds upon his boundary line, and the building is thrown down by reason of excavations made upon the adjoining lot (in the absence of improper motive and carelessness in the execution of the work) no recovery can be had for the injury done to the building. There are two early cases in which, under similar circumstances, a recovery was had, though it does not appear that in either of them the point now under consideration was distinctly raised. In one of them, the exceptions taken were confined to the form of the declaration. Slingsley v. Barnard, 1 Rolle's Rep. 430; Smith v. Martin, 2 Saund. 394.

But the cases denying the right of recovery under such circumstances are so numerous, and the modern cases so uniform, that the question must be considered as finally at rest, so far as authority can settle it. 2 Rolle's Abr. 565, Trespass I, pl. 1; Com. Dig. "Action on the case for nuisance," C. Massey v. Goyner, 4 Carr. & P. 161; Wyatt v. Harrison, 3 Barn. & Ad. 871; Partridge v. Scott, 3 Mees. & W. 220; Humphries v. Brogden, 12 Q. B. 739; Gayford v. Nicholls, 9 Exch. R. 702; Thurston v. Hancock, 12 Mass. 220; Panton v. Holland, 17 J. R. 92; Lasala v. Holbrook, 4 Paige 169; Hay v. The Cohoes Co.,

2 Const. 159. The principle upon which the decisions rest has been so elaborately discussed, and so repeatedly and thoroughly investigated, that a reinvestigation would be profitless labor. It is only necessary to say, that we regard the question as settled in accordance with principle and sound policy.

Whether the same principle applies to injuries done to the soil in its natural condition, with no buildings erected upon it, is a question of more difficult solution, and which, until recently, has not been the subject of express adjudication. It has, however, frequently been discussed, and the principle upon which it rests investigated. The distinction between a claim for an injury to the soil, and to buildings erected upon it, appears to have been first noted by Sergeant Rolle, in his note to the case of Wilde v. Minsterly, already cited. The report is as follows: "If A, seized in fee of copyhold land closely adjoining the land of B, and A erect a new house upon his land, and any part of his house is erected on the confines of his land adjoining the land of B, if B afterwards dig his land so near to the foundation of the house of A, but not in the land of A, that by it the foundation of the messuage and the messuage itself fall into the pit, still no action lies by A against B, inasmuch as it was the fault of A, himself, that he built his house so near the land of B; for he cannot by his own act prevent B from making the best use of his land that he can." "But it seems," the reporter adds, "that a man who has land closely adjoining my land cannot dig his land so near mine that mine would fall into his pit, and an action brought for such an act would lie." 2 Rolle's Abr. 564, Trespass. This dictum is cited as authority by Baron Comyns. Com. Dig. "Action on the case for nuisance" A.

It certainly seems paradoxical, at first view, that a man may recover for an injury done to his land by an excavation in the land of his neighbor, but not for an injury by the same act to the buildings erected upon the land. But it will appear, upon consideration, that the distinction is founded in reason and sound principle. The distinction and the grounds of it are thus stated by Gale & Whatley, Law of Easements, 215, 218. The right to support from the adjoining soil may be claimed either in respect of the land in its natural state, or land subjected to an artificial pressure by means of buildings

or otherwise. If every proprietor of land was at liberty to dig and mine at pleasure on his own soil, without considering what effect such excavations must produce upon the land of his neighbor, it is obvious that the withdrawal of the lateral support would in many cases cause the falling in of the land adjoining. As far as the mere support to the soil is concerned, such support must have been afforded as long as the land itself has been in existence. And it would seem, in all those cases at least in which the owner of the land has not, by buildings or otherwise, increased the lateral pressure upon the adjoining soil, that he has acquired by such ancient enjoyment, a right to the support of it, rather as a right of property than as an easement, as being necessarily and naturally attached to the soil. The negation of this principle would be incompatible with the very security for property, as it is obvious that if the neighboring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone. * * * Where, however, anything has been done to increase the lateral pressure, as where buildings have been erected, it appears to be clearly settled, that no man has a right to such increased support, unless the building, or other thing which makes it necessary, is of ancient erection.

In Wyatt v. Harrison, 3 Barn. & Ad. 871, Lord Tenterden, in delivering the judgment of the court of King's Bench, said: "It may be true, that if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbor digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground because mine will then become incapable of supporting the artificial weight which I have laid upon it; and this is consistent with 2 Rolle's Abr., Trespass I, pl. 1."

This right to lateral support from adjoining soil (said Lord Campbell, in delivering the judgment of the Court of Queen's Bench) is not like the support of one building upon another, supposed to be gained by grant, but it is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for

that purpose, is entitled to the lateral support of the other close, the very instant when the conveyance is executed, as much as after the expiration of twenty years, or any longer period. Humphries v. Brogden, 12 Queen's B. 743.

In Thurston v. Hancock (12 Mass. 229), Ch. Just. Parker, in delivering the judgment of the Supreme Court of Massachusetts, said: "A man, in digging upon his own land, is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon, or near, the line by his neighbor."

In Hay v. The Cohoes Company (2 Const. 162), Gardiner, J., in delivering the judgment of the Court of Appeals of the state of New York, after citing the dictum of Rolle, that "a man cannot dig his land so near mine as to cause mine to slide into the pit," said: "In the last case, the injury would consist in depriving the owner of a part of the soil to which his right was absolute. No degree of care in the excavation by the pit owner would, I apprehend, justify the transfer of a portion of another man's land to his own."

In Lasala v. Holbrook, 4 Paige 172, Chancellor Walworth says: "I have a natural right to the use of my land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, and the owners of these lots will not be permitted to destroy my land by removing this natural support or barrier. Thus, it is laid down by Rolle, that I may sustain an action against a man who digs a pit on his own land so near to my lot that my land falls into the pit. But my neighbor has the right to dig the pit upon his own land, if necessary to its convenient or beneficial use, when it can be done without injury to my land in its natural state. I cannot, therefore, deprive him of this right, by erecting a building on my lot, the weight of which will cause my land to fall into the pit, which he may dig in the proper and legitimate exercise of his previous right to improve his lot."

In neither of the foregoing cases, in which the dictum of Rolle was cited and approved, was the question now under consideration the precise point adjudicated.

But in Richardson v. The Vermont Central Railroad Co., 25 Verm. R. 465, the plaintiff claimed damages upon the ground, among others, that the defendants had made an excavation for their railroad so near the line of the plaintiff's land, that a part of his soil had fallen away. The court adopted the distinction taken by Rolle, and held that the plaintiff was entitled to recover. They say the injury is in depriving the owner of a portion of his soil, to which his right is absolute.

In Farrand v. Marshall, 19 Barb. S. C. Rep. 380, an injunction had been granted in equity, to restrain the defendant from removing the earth adjacent to the plaintiff's land, for the purpose of making brick, and thus withdrawing the natural support of the plaintiff's soil, and permitting it to sink down and slide away. A motion to dissolve the injunction was denied by Harris, J. In delivering the opinion, he said, "the right to lateral support must be regarded as an incident to the land. It is a right of property necessarily and naturally attached to the soil." In this case, it appeared that the plaintiff's land was a city lot upon high ground, and that the defendant was making his excavation to the depth of fifty feet, for purposes to which such lands are not usually applied.

The only judicial opinion which I have met with in conflict with this weight of authority, will be found in Radcliff's Ex'rs v. The Mayor of Brooklyn, 4 Const. R. 202. Mr. Justice Bronson, in delivering the opinion of the Court of Appeals of New York in that case, assailed the doctrine with his accustomed vigor and force of argument, and denied that it was law. It seems, however, from a statement in 19 Barb. 384, that this part of the opinion was not the opinion of the court, and it certainly was not the point at issue in the cause, nor necessarily involved in the decision.

In a note of the accurate and critical American editors to Brown v. Windsor, 1 Cromp. & Jer. 29, it is said: "This cautious suggestion" (of Rolle, 2 Rolle's Abr. 564) "is magnified by Lord Campbell, C. J., in Humphries v. Brogden, 12 Q. B. 739, into an authority for the principle, that though there is not a right of lateral support for buildings, there is a right of lateral support to soil from the adjoining soil, which is a right of property passing with the soil. In that laborious opinion, Lord Campbell appears quite to misunderstand the

meaning of Rolle, and to import into the English law a doctrine which has no rightful existence there. The true principle to be gathered from the passage in Rolle is, that the owner of the soil owes no support to either the soil or the buildings of his neighbor; but that in excavating his own soil he has no right to rob his neighbor of soil that belongs to him; and therefore, if he brings down his neighbor's soil into the cavity which he has made in his own, he is responsible to him for the value of the soil which he has thus abstracted." There may be consequences resulting from the doctrine, that the right to lateral support from the adjoining land is a right of property, which will require it to be adopted with some qualifications. But in the absence of any such right, it is difficult to perceive how the party removing the adjacent soil can possibly be regarded as a wrongdoer, or be held liable in damages for the consequences of the act. If the soil removed belongs to the defendant, and the plaintiff has no right to require that it should remain undisturbed, as far as may be necessary to support his soil, upon what principle is it that the defendant can be held accountable for the fall of the plaintiff's soil?

The decided weight of authority and sound principle concur in support of the position, that there is incident to land, in its natural condition, a right to support from the adjoining land; and that if the land sinks or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. The measure of damages in such case is not what it will cost to restore the lot to its former situation, or to build a wall to support it, but what is the lot diminished in value by reason of the acts of the defendant. It will frequently happen that the subsidence of land in a city, occasioned by the grading of adjoining lots, thus bringing the surface nearer to the grade of the street, will but slightly diminish its real value. The only true criterion of damages, therefore, is the diminution in the value of the lot. How far the injury resulted from the acts of the defendant, and how far it was occasioned by others, is a question of fact for a jury. * * *

CHAPTER XI.

COUNSEL FEES AND EXPENSES OF LITIGATION.

Counsel Fees in Tort Actions.

DAY v. WOODWORTH.

13 How. 369 (U. S.).

GRIER, J. * * * The court instructed the jury "that if they should find for plaintiff on the first ground, viz., that the defendants had taken down more of the dam than was necessary to relieve the mills above, unless such excess was wanton and malicious, then the jury would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess, but not anything for counsel fees or extra compensation to engineers."

This instruction of the court is excepted to, on two grounds. First, because "this being an action of trespass, the plaintiff was not limited to actual damages proved," and secondly, that the jury, under the conditions stated in the charge, should have been instructed to include in their verdict for the plaintiff, not only the actual damages suffered, but his counsel fees and other expenses incurred in prosecuting his suit.

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil

actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called "smart money." This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.

This doctrine about the right of the jury to include in their verdict, in certain cases, a sum sufficient to indemnify the plaintiff for counsel fees and other real or supposed expenses over and above taxed costs, seems to have been borrowed from the civil law and the practice of the courts of admiralty. At first, by the common law, no costs were awarded to either party, eo nomine. If the plaintiff failed to recover he was amerced pro falso clamore. If he recovered judgment, the defendant was in misericordia for his unjust detention of the plaintiff's debt, and was not therefore punished with the expensa litis under that title. But this being considered a great hardship, the statute of Gloucester (6 Edw. I. c. 1) was passed, which gave costs in all cases when the plaintiff recovered damages. This was the origin of costs de incremento; for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause. See Bac. Abr. tit. Costs.

Under the provisions of this statute every court of common law has an established system of costs, which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suit. It is true, no doubt, and is essentially so in this country (where the legislatures of the different States have so much reduced attorneys' fee-bills, and refused to allow the honorarium paid to counsel to be exacted from the losing party), that the legal taxed costs are far below the real expenses incurred by the litigant; yet it is all the law allows as expensa litis. If the jury may, "if they see fit," allow counsel fees and expenses as a part of the actual damages incurred by the plaintiff, and then the court add legal costs de incremento, the defendants may be truly said to be in misericordia, being at the mercy both of court and jury. Neither the common law, nor the statute law of any State, so far as we are informed, has invested the jury with this power or privilege. It has been sometimes exercised by the permission of courts, but its results have not been such as to recommend it for general adoption either by courts or legislatures.

The only instance where this power of increasing the "actual damages" is given by statute is in the patent laws of the United States. But there it is given to the court and not to the jury. The jury must find the "actual damages" incurred by the plaintiff at the time his suit was brought, and if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigious, or has caused unnecessary expense and trouble to the plaintiff, the court may increase the amount of the verdict, to the extent of trebling it. But this penalty cannot, and ought not, to be twice inflicted; first, at the discretion of the jury, and again at the discretion of the court. The expenses of the defendant over and above taxed costs are usually as great as those of plaintiff; and yet neither court nor jury can compensate him, if the verdict and judgment be in his favor, or amerce the plaintiff pro falso clamore beyond taxed costs. Where such a rule of law exists allowing the jury to find costs de incremento in the shape of counsel fees, or that equally indefinite and unknown quantity denominated (in the plaintiff's prayer for instruction) "&c.," they should be permitted to do the same for the defendant where

he succeeds in his defense, otherwise the parties are not suffered to contend in an equal field. Besides, in actions of debt, covenant, and assumpsit, where the plaintiff always recovers his actual damages, he can recover but legal costs as compensation for his expenditure in the suit, and as punishment of defendant for his unjust detention of the debt; and it is a moral offense of no higher order, to refuse to pay the price of a patent or the damages for a trespass, which is not wilful or malicious, than to refuse the payment of a just debt. There is no reason, therefore, why the law should give the plaintiff such an advantage over the defendant in one case, and refuse it in the other. See Barnard v. Poor, 21 Pickering, 382; and Lincoln v. The Saratoga Railroad, 29 Wendell, 435.

We are of opinion, therefore, that the instruction given by the court in answer to the prayer of the plaintiff, was correct.

CHAPTER XII.

DAMAGES WHERE PROPERTY IS SEVERED FROM REALTY.

Replevin of Property on Which Labor Has Been Done.

SINGLE v. SCHNEIDER.

24 Wis. 299. 1869.

PAINE, J. This action was brought to recover possession of certain lumber, which it was claimed had been manufactured from logs cut without authority upon the plaintiff's land. There was evidence tending to show that the defendants, who owned land adjoining the plaintiff's, got over the line by mistake. And there was also some evidence tending to show that they cut some on the plaintiff's land, after they were notified of the mistake. There was also an offer of a tax deed in evidence, which was rejected; and the plaintiff's affidavit shows that the defendants claimed title to the property under this tax deed in evidence, which was rejected; and the plaintiff's affidavit shows that the defendants claimed title to the property under this tax deed. There was some talk between the parties about the defendants settling with the plaintiff for what they had cut; but this does not seem to have been done. Nor did the plaintiff take any steps to recover the logs, but marked them and kept watch of them at the mills until they were sawed and rafted, and then brought this action to recover the lumber. The defendants gave an undertaking under the statute, and retained the property. The jury found for the plaintiff, and assessed the value of the property at the entire value of the lumber as it was proved to have been at the time of commencing this suit.

The material and interesting question in the case is, whether, assuming the logs to have been cut on the plaintiff's land, he ought to recover the entire value of the lumber, without any reduction for the labor of the defendants in cutting, hauling, and manufacturing the logs into the lumber.

If the action had been for the trespass or conversion, he could only have recovered the value of the timber at the time it was taken, at least if it was taken by mistake. Weymouth v. The Ch. & N. R. R. Co., 17 Wis. 550. And, upon the evidence and the whole record, I think these defendants stand in as favorable a position as though it were conceded that the logs were taken by mistake. There is proof tending to show a mistake as to a part; and it appears, also, from the plaintiff's affidavit, that they claimed title to the land. They are not to be regarded, therefore, as willful trespassers. Upon these facts, it seems contrary to the dictates of natural justice that the plaintiff should be allowed to wait quietly until the defendants had manufactured the logs into lumber, enhancing their value four or five fold, and then recover against them that entire value. True, it is generally recognized that a wrongdoer cannot, by changing the form of another's property, change the title. The owner may pursue it, and reclaim it specifically by whatever remedy the law gives him for that purpose. If he gets it, it is his. But the apparent injustice of allowing one to thus avail himself of the labor and money of another, in cases similar to this, has led to a modification of this stringent rule of ownership, wherever the question is resolved into one of mere compensation in money for whatever injury the party may have suffered. This modification has thus far been developed almost entirely in actions of trespass or trover, like that of Weymouth v. Ch. & N. R. R. Co., and the cases therein referred to. But, in the recent case of Herdic v. Young, 55 Pa. St. 176, the Supreme Court of Pennsylvania applied the same rule in an action of replevin. They there held that, inasmuch as the law gave the defendant the power to retain the property by giving a bond, whenever he availed himself of that right, the question became then one of damages merely, and that the form of action ought not to produce a difference in the result. The damages to be recovered should be the same as though the action were trespass. This case seems to us so well adapted to the promotion of justice and the prevention of injustice, that we have concluded to follow it. To apply that rule here would have required the value of the property to have been assessed at the full value of the lumber, deducting the expense of all that the defendants had done upon it down to the time the suit was begun. As remarked by the

court in that case: "Such a standard of damages, growing out of the nature of the act and the form of the action, is reasonable, and does justice to both parties. It saves to the otherwise innocent defendant his labor and money, and gives to the owner the enhancement of the value of his property growing out of other circumstances, such as a rise in the market price, a difference in price between localities, and other adventitious causes." Our statute provides that the jury shall assess the value of the property. But that is merely as the basis of recovery in case a delivery cannot be had. The intent was to fix the value that the plaintiff was entitled to recover. Thus, in case of a lien or other special interest, the value to be fixed would be the amount of that lien or interest. Booth v. Ableman, 20 Wis. 21. And although, in strict law, the plaintiff is the general owner of the property, yet, when it is once settled that he ought not to recover the value it has received from the defendant's labor, the application of the rule would seem to place him upon substantially the same footing with the owner of a special interest, so far as ascertaining the value is concerned. Perhaps the best way in such a case would be to direct the jury to find the actual entire value of the property, and to find specially the amount to which its value had been enhanced by the defendant's labor. And then, in case of judgment for the plaintiff, it would be in the alternative, for a delivery, or, if that could not be had, for the amount of the difference between the two sums thus found.

It is quite probable that this question was not distinctly presented to the court below. But it seems to be fairly raised by the motion for a new trial, on the ground that the verdict was against the law and the evidence; and that motion ought to have been granted.

For this reason the judgment must be reversed, and the cause remanded for a new trial.

BY THE COURT.—Ordered accordingly.

CHAPTER XIII.

DAMAGES WHERE OWNER HAS A LIMITED INTEREST.

Where There Is More Than One Owner Interested.

BREWSTER v. WARNER.

136 Mass. 57. 1881.

* * * The plaintiff, on September 15, 1881, hired a horse and carriage from the livery stable of one Foster in Boston to drive to Beacon Park and return. Just before reaching the Park gate, a servant of the defendants, who was driving a pair of horses hitched to a hack, carelessly as it was alleged, drove against the carriage in which the plaintiff was driving, and injured it. This action was brought to recover the damages so sustained.

Foster was the owner of the carriage injured. The plaintiff told Foster to send the carriage to a repair shop and have it repaired, and he would pay the bill. The carriage was repaired, and the bill for repairs was made to the plaintiff, and presented to him for payment, but he had not paid it at the time of trial.

This was all the evidence as to the ownership, use, and repairs of the carriage. The defendants requested the judge to rule that, upon this evidence, the plaintiff could not recover, regardless of the question of negligence. But the judge ruled otherwise, and found for the plaintiff, and the defendants alleged exceptions.

J. O'Toole, for the defendants.

A. O. Brewster, for the plaintiff.

HOLMES, J. The modern cases follow the ancient rule, that a bailee can recover against a stranger for taking chattels from his possession. Shaw v. Kaler, 106 Mass. 448; Swire v. Leach, 18 C. B. (N. S.) 479. See Year Book 48 Edw. III. 20, pl. 8; 20 H. VII. 5, pl. 15; 2 Rolle Abr. 569, Trespass, P. pl. 5;

Nicolls v. Bastard, 2 Cr., M. & R. 659, 660. And as the bailee is no longer answerable to his bailor for the loss of goods without his fault, his right to recover must stand upon his possession, in these days at least, if it has not always done so. But possession is as much protected against one form of trespass as another, and will support an action for damage to property, as well as one for wrongfully taking or destroying it. No distinction has been recognized by the decisions. Rooth v. Wilson, 1 B. & Ald. 59; Croft v. Allison, 4 B. & Ald. 590; Johnson v. Holyoke, 105 Mass. 80. The ruling requested was obviously wrong, as it denied all right of action to the plaintiff, and was not confined to the quantum of damages.

Even if the question before us were whether the plaintiff could recover full damages, his right to do so could not be denied as matter of law. A distinction might have been attempted, to be sure, under the early common law. For, although the bailee's right was undoubted to recover full damages for goods wrongfully taken from him, this was always accounted for by his equally undoubted responsibility for their loss to his bailor, and there is no satisfactory evidence of any such strict responsibility for damage to goods which the bailee was able to return in specie.

But if this reasoning would ever have been correct, which is not clear, it can no longer apply when the responsibility of bailees is the same for damage to goods as for their loss, and when the ground of their recovery for either is simply their possession. Any principle that permits a bailee to recover full damages in the one case, must give him the same right in the other. But full damages have been allowed for taking goods, in many modern cases, although the former responsibility over for the goods has disappeared, and has been converted by misinterpretation into the now established responsibility for the proceeds of the action beyond the amount of the bailee's interest. Lyle v. Barker, 5 Binn. 457, 7 Cowen, 681, n. (a); White v. Webb, 15 Conn. 302; Ullman v. Barnard, 7 Gray, 554; Adams v. O'Connor, 100 Mass. 515, 518; Swire v. Leach, 18 C. B. (N. S.) 492. The latter doctrine has been extended to insurance by bailees. De Forest v. Fulton Ins. Co., 1 Hall, 84, 91, 110, 116, 132; Crompton, J., in Waters v. Monarch Ins. Co., 25 L. J. (N. S.) Q. B. 102, 106.

If the bailee's responsibility over in this modern form is not sufficient to make it safe in all cases to recognize his right to recover full damages, even where it was formerly undoubted, at least it applies as well to recoveries for harm done to property as it does to those for taking. Rindge v. Coleraine, 11 Gray, 157, 162. And if full damages are ever to be allowed, as it is settled that they may be, they should be recovered in the present case, where the plaintiff appears to have made himself debtor for the necessary repairs with the bailor's assent. Johnson v. Holyoke, ubi supra. It is not necessary to consider what steps might be taken if the bailor should seek to intervene to protect his interest.

Exceptions overruled.

CHAPTER XIV.

BREACH OF WARRANTY.

Difference Between Price and Value of Article.

MORSE v. HUTCHINS.

102 Mass. 439.

Tort for deceit in making false and fraudulent representations to the plaintiff touching the business and profits of a firm of which the defendant was a member, and thereby inducing the plaintiff to buy the interest of the defendant in the stock and good will of the firm. A count in contract for the same cause of action was joined. Answer, a general denial and a plea of a discharge in bankruptcy.

At the trial in the Superior Court, Brigham, C. J., ruled that the discharge in bankruptcy was a defense to the second count, but not to the first count; and the plaintiff relied on the first count only.

The judge instructed the jury that "the measure of damages would be the difference between the actual value of the stock and good will purchased at the time of the purchase and the value of the same had the representation been true."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

GRAY, J. The objections that either the joinder of a count in contract with the count in tort, or the certificate of discharge in bankruptcy, would defeat the plaintiff's right of action in tort for the defendant's false and fraudulent representations, were hardly relied on at the argument, and are groundless. Gen. Sts., c. 129, par. 2, cl. 5; Crafts v. Belden, 99 Mass. 535; U. S. St. 1867, c. 176, par. 33.

The rule of damages was rightly stated to the jury. It is now well settled that, in actions for deceit or breach of warranty, the measure of damages is the difference between the

actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be. Stiles v. White, 11 Met. 356; Tuttle v. Brown, 4 Gray, 457; Whitmore v. South Boston Iron Co., 2 Allen, 52; Fisk v. Hicks, 11 Foster, 535; Woodward v. Thacher, 21 Verm. 580; Muller v. Eno, 4 Kernan, 597; Sherwood v. Sutton, 5 Mason, 1; Loder v. Kekule, 3 C. B. (N. S.) 128; Dingle v. Hare, 7 C. B. (N. S.) 145; Jones v. Just, Law Rep. 3 Q. B. 197. This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him.

Remote Vendee May Recover.

BROOKS v. BLACK.

68 Miss. 161, 24 Am. St. Rep. 259.

Proceeding to recover damages for breach of warranty. The opinion states the case.

COOPER, J. * * * The second assignment of error presents an interesting question which has never before been considered by this court, and so far as our researches have led, has not often arisen in other states. That question is, What is the measure of damages in a suit by an evicted vendee upon the covenant of warranty of a remote vendor running with land? May he recover the purchase price received by the remote vendor? Or is he limited by the consideration he himself has paid? It is supposed by counsel for the appellant that the sum paid by the evicted party—the value of the land at the time of his purchase—is fixed as the measure of damages in this state by the case of White v. Presly, 54 Miss. 313. But the question was not raised by the record in that case; and although Chalmers, J., in delivering the opinion of the court, declares that the sum paid by the evicted party, with interest, the same being less than the sum received by the remote vendor, is a correct measure of damages, the declaration does not thereby become decision. In that case, Huntington had sold land to one Jones, from whom the title had passed under execution sale to Presly. Presly lost the land by reason of title paramount to that of Huntington, and sued Huntington's administrator on the covenants of warranty,

and recovered in the court below the sum he had paid at execution sale, and interest thereon, the same being less than Huntington had received. The administrator appealed. He, as appellant, could not assign as error the fact that damages less than should have been awarded had been given; nor could the appellee raise the point here, that the judgment he sought to maintain should have been for a greater sum. The observation of the judge was not upon any question sought to be raised, or which could have been decided, and therefore is not the decision of the court.

Among the first cases in which the liability of a vendor to his vendee for breach of the warranty for quiet possession was considered were Staats v. Ten Eyck, 3 Caines, 112, 2 Am. Dec. 254, and Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 229. It was contended for the plaintiffs in these cases that the covenant was one of indemnity, and therefore that the measure of damages should be the value of the land at the time of the breach. In Staats v. Ten Eyck, recovery was sought for the appreciation in the value of the land above the price paid by natural causes, and in Pitcher v. Livingston, to recover above the purchase price the value of permanent improvements put upon the land by the vendee. The arguments for the plaintiffs were rested upon the rule of damages in breaches of personal covenants in other instances, but the court rejected the contention, and adopted, by analogy, the measure of damages applied in the common-law action of warrantia chartæ, and in suits for the breach of the covenant of seisin, viz., the value of the land determinable by the price paid the vendor; and since the vendee was liable to the real owner for mesne profits, he was also entitled to interest on the purchase-money for the time for which such mesne profits might be recovered against him. The measure of damages established in these cases has been so generally adopted in other states as to have become almost universal, and it would be superfluous to cite authorities in its support. It has been announced as the rule in this state. Phipps v. Tarpley, 31 Miss. 433. We refer to the cases above, not for the purpose of announcing the rule, which applies as between vendor and vendee, for that is too well settled to admit of controversy, and is conceded by counsel for appellant; we note them to show that the suggestion now made that the covenant is one of indemnity was

rejected by the court in the earliest cases. In a certain sense, all "covenants" are for indemnity; but the sense in which the word is now used in argument of counsel, that redress is to be afforded to the extent and within the limit of the actual loss sustained by the vendee, in an action against his immediate vendor, it may be confidently asserted is against the overwhelming current of authority. In these cases at least, the decisions are practically uniform, that, regardless of the value of the land at the time of eviction, the recovery is measured by the value of the land at the time of the conveyance, which value is conclusively fixed by the price paid by the vendee or received by the vendor. Another proposition may be confidently stated as supported by an equally uniform current of authority, that the covenant for quiet enjoyment runs with the land, and passes to all subsequent owners claiming in the chain of title. The purchaser of land gets, by operation of law, not only the land, but also the covenant of the first vendor, and that as well where the covenant is by its words to the vendee only, as where it is with him and his assigns. When we come, however, to the precise question now presented, which is whether a remote vendee may recover from the remote vendor the purchase-money paid by the first vendee or is limited to the amount paid by himself to his vendor, we find direct conflict in the decisions, and so far as we have found the cases they are nearly equal in number on each side. In North Carolina, Williams v. Beeman, 2 Dev. 483; Minnesota, Moore v. Frankenfield, 25 Minn. 540; Tennessee, Mette v. Dow, 9 Lea, 93; Whitzman v. Hirsh, 87 Tenn. 513; and Maryland, Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480—it is held that such remote vendee can only recover what he has paid to his own vendor. On the other hand, it is held in South Carolina, Lowrance v. Robertson, 10 S. C. 8; Iowa, Mischke v. Baughn, 52 Iowa 528; and Kentucky, Dougherty v. Duvall, 9 B. Mon. 57—that such vendee may recover the full consideration received by the defendant, the remote vendor. Williams v. Beeman was decided by a divided court, Ruffin, J., dissenting, and Mette v. Dow (followed by Whitzman v. Hirsh) overruled Hopkins v. Lane, 9 Yerg. 79. In Crisfield v. Storr, 36 Md. 129, 11 Am. Rep. 480, the court declares that it had carefully examined many authorities upon the point, and that the decided weight of authority was that the plaintiff could not recover on the war-

ranty of a remote vendor more than he had himself paid to his immediate vendor; and in support of this declaration cites the following cases: Booker v. Belle's Ex'rs, 3 Bibb, 175, 6 Am. Dec. 641; Kelly v. Dutch Church, 2 Hill, 116; Bennet v. Jenkins, 13 Johns. 51; Hanson v. Buckner, 4 Dana, 253, 29 Am. Dec. 401; Wyman v. Ballard, 12 Mass. 304; Stewart v. Drake, 9 N. J. L. 142; Wilson v. Forbes, 2 Dev. 39; Pitcher v. Livingston, 4 Johns. 1, 4 Am. Dec. 228. We have examined these cases, and find all of them except Kelly v. Dutch Church to be suits by the immediate vendee or his heirs at law against the immediate vendor or his personal representative. Kelly v. Dutch Church was a suit by the assignee of the lessee against the lessors of his assignor. The trial court had awarded, as damages, the rent reserved in the lease; thus, as it seems to us, making the sum paid to the lessors, and not that paid for the assignment, the measure of damages. But the facts are not very clearly stated, and the case cannot be held to decide anything upon the point. The question seems to have been more fully examined upon principle in the cases of Williams v. Beeman, 2 Dev. 483; Mette v. Dow, 9 Lea, 93, and Lowrance v. Robertson, 10 S. C. 8, than in any other. In Williams v. Beeman, the majority of the court thought that the remote vendee was suing to recover his own damages, and not those of the first vendee, and therefore should be restricted to the actual damages he had sustained. In Mette v. Dow, the court compared the covenant to a penal bond, the recovery on which would be limited to the actual damages sustained by the party suing. The dissenting opinion of Ruffin, J., in Williams v. Beeman, is, in our opinion, a complete reply to this position. He says: "The value at the time of the sale by the first vendor is the measure prescribed. It ought to operate both ways. If the vendor be not liable for more, he ought not to be for less. I understand it to be admitted that if his immediate vendee be evicted, he is still liable for that. I do not see why he should not be equally so to the assignee as his vendee. Does the assignment change his covenant? It runs with the land, and he who buys the land buys the covenant. He gets the whole of it. But it is said that the assignor in such case cannot recover from the first vendor more than the evicted vendee gave for the land, because this is all the assignor would be obliged to pay the assignee, and there-

fore he has complete indemnity. This is changing the rule essentially. It puts it upon the amount of the loss, not the price paid. It would seem to me that whoever buys land with a covenant adhering to it takes it with all the advantages it conferred on his assignor. It is so in personal contracts, for we do not inquire what the assignee of a bond gave for it. The obligor must pay him the whole." This argument seems to us unanswerable. It at least never has been answered in any case we have seen. When it is conceded that by his covenant a vendor binds himself to return the purchase price he receives in the contingency of a failure of the title conveyed, and that this obligation is assigned by operation of law, to whoever may succeed to the title, it would seem to follow, as a corollary, that the recovery, by whomsoever had, ought to be equal to the obligation. But under the rule announced in Maryland, Minnesota, Tennessee, and North Carolina, the obligation of the covenantor is variable, and dependent upon transactions with which he is not connected. In these states, a man selling an estate to A for five thousand dollars would be liable to pay A that sum if he should be evicted. But if A sells the same land to B for five hundred dollars, the liability of the first vendor is reduced to that sum, and thus B, the purchaser from A, gets less than the obligation A held. But if B sells to C for five thousand dollars, the original obligation revives, and the absurdity is presented of B's failing to get, and therefore to have, what A owned, and still transferring to C that which he never had. The rule announced in Kentucky, Iowa, and South Carolina, is not only commended by its justice, and by analogy to other well settled principles, but possesses the advantage of stability and uniformity. As we have said, it is quite generally held that by the covenant for quiet enjoyment the grantor binds himself to pay, in event of failure of title, the then value of the land, which value is determined by the price paid. Appreciation by natural causes, or by improvements put upon the property by the vendee, does not enlarge his liability; nor is it decreased by depreciation in value from any cause. By legal intendment the obligation is as though the covenantor should say to the covenantee: "You, or the person succeeding to the title I convey, shall hold the land, or if you cannot, by reason of title in another, the money I have received shall be restored in lieu of the land." We are unable

to perceive any principle upon which this obligation shall be diminished because of the price in consideration of which it may be assigned. We therefore conclude that the obligation of the covenantor is the same to the assignee that it was to the covenantee, and being such, is governed by the same measure of damages. * * *

But, since the court also erred in fixing the value of the land at $6,000, its value at the time of eviction, instead of $6,296, the price paid to the defendant, both errors must be corrected to make a proper result.

The decree is reversed, and decree here.

LEADING ILLUSTRATIVE CASES LAW OF INSURANCE

PART II

FUNDAMENTAL PRINCIPLES

CHAPTER II.

INSURABLE INTEREST.

Insurable Interest in Property.

SIBLEY v. PRESCOTT INS. CO.

Supreme Court of Michigan, 1885. 57 Mich. 14, 23 N. W. 473.

COOLEY, C. J. This cause was tried by the circuit judge without a jury, and the facts as found are substantially as follows:

January 28, 1884, Thomas Swan, of Detroit, made a voluntary assignment to the plaintiff for the benefit of his creditors, under the "Act to provide for the regulation and enforcement of assignments for the benefit of creditors," approved May 13, 1879 (Pub. Acts, 181). The assignment and the acceptance thereof by the plaintiff were duly filed January 29, 1884. * * *

The policy in suit was issued to plaintiff as assignee and insured him to amount of $2,500—$1,250 on the stock and $1,250 on furniture and fixtures assigned—but not exceeding his interest in the property. * * *

February 5, 1884, before Sibley had filed his bond and qualified as assignee, there was a fire, and the property insured was damaged by fire. Two days later Sibley qualified as assignee by filing the statutory bond and inventory. * * *

Plaintiff brought suit on the policy. The defendant insisted

under the foregoing facts that plaintiff, not having filed his bond as assignee, had no insurable interest. * * *

The acceptance of the assignment and the taking possession of the property create a trust with the assignee as trustee, and the assignee may defend the trust by the institution of any necessary suits for the purpose. Coots v. Radford, 47 Mich. 37; S. C. 10 N. W. Rep. 69. The trusteeship is, indeed, for the time being imperfect, for he cannot proceed in its execution before the bond is filed. It is subject to a contingency in the nature of a condition subsequent which may defeat his power to act without destroying the trust; but that, in the meantime, he may do whatever may be found necessary for the protection of the interests of the beneficiaries in the assigned property is recognized by the case just cited. The assignor has transferred to him the legal title for that purpose, and his power to act as trustee is merely suspended for the time being, until certain acts shall be done which are essential to give due protection to parties concerned. But that he may insure the property against destruction by fire in the meantime we have no doubt. He may do so just as properly and with as much right as he may by force or by suit defend his possession against trespassers. But it is further contended that this does not make the plaintiff sole and unconditional owner, and as his interest was not truly stated in the policy, the policy is void for that reason.

The policy was issued to the plaintiff as assignee. The defendant was therefore apprised that the plaintiff was not asking insurance in his own right, but in some right which had come to him by assignment. The statement in that regard in the policy was true as far as it went, and if defendant wanted anything further it should have been called for. There was no deception and no concealment in the case; plaintiff had such ownership of the property as was in any one; and though it was not unconditional, the designation of the plaintiff as trustee would be sufficiently suggestive of a condition to put the insurer upon inquiry. If the defendant failed to make inquiry, it must be deemed satisfied with such information as it possessed.

An argument is also made that the plaintiff had no insurable interest because the policies, which passed to him with the assignment, more than covered the loss. But this, we conceive, is at best only specious. Whether the policies came to him with the

trust, or whether he took them out himself, would make no difference; he had the property with the policies upon it, and might take out further insurance as any owner might, subject to the customary conditions as to information, over-valuation, etc.

ROHRBACH v. GERMANIA FIRE INS. CO.

Court of Appeals of New York, 1875. 62 N. Y. 47.

FOLGER, J. The plaintiff cannot maintain this action unless he had an insurable interest in the buildings which were the subject of the risk taken by the defendants, and which were destroyed by fire. He seeks to found such an interest upon the instrument in writing executed by his wife after her marriage to him.

Without entering minutely into a consideration of the effect of the marriage upon her pre-existing obligations and liabilities to him, it is sufficient to say that the instrument executed by her was based upon a consideration adequate to uphold her express promise; that though made by a married woman it was in due form to affect her separate estate; and that though a transaction between a wife and her husband, yet equity would have upheld and enforced it in his favor against her had she lived, and will enforce it against her estate now that she is dead. By it he was an equitable creditor of her estate at the time of the insurance; but he was no more than a general creditor. Though the instrument contains the phrase, "shall be a lien on my property," no specific lien was thereby created, and so far as that instrument had effect, no more than a general equitable lien, yet to be enforced and made specific by a judgment in an equitable action. The plaintiff stood thereby in no better plight, so far as having an insurable interest in the building, than would have stood a creditor of the deceased wife who held a judgment only, rendered and docketed against her, which would have become a general lien upon her real property. He did not stand in so good plight but for other facts now to be mentioned. She had died after giving the instrument, leaving personal and only this real estate; a person other than the plaintiff had taken out letters of administration; the personal estate was by much insufficient to pay the debts against her; and this real estate, in-

cluding the insured buildings, would in the due course of administration, for a space of at least three years from the granting of letters of administration, be liable to sale for the purpose of meeting her liabilities, and it was the only fund to which plaintiff could look for payment; the plaintiff was in the possession of the buildings, occupying them at the time of the fire. Judgment creditors, if any, would have had a preference in payment from the personal estate (2 R. S. 87, 27, sups. 3, 4), and, of course, the lien acquired by the docketing of their judgments could not be disturbed by the application of the administrator for leave to sell the real estate for the payment of debts, and the obtaining of permission to do so. But yet the plaintiff had a right to compel an accounting by the administrator (2 R. S. 92, 52), and a sale of the real estate (id. 108, 48), for the payment of his and other debts. Thus, the real estate was to a degree subject to the payment thereof, and was in fact, from the slender amount of the personal property, substantially all that he could look to for payment. His position was not as good in some respects as that of a judgment creditor, but it was not unlike it; both had a right to have the real estate sold for the payment of their debts; for a certain space of time it could not escape the exercise of that right; and it cannot be said that the interest of a judgment creditor in the real estate, as an interest in property, was greater or nearer than that of the plaintiff. It was more manageable, but not more direct in the end. * * *

I conclude that a creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby.

CUMBERLAND BONE CO. v. ANDES INSURANCE CO.

Supreme Judicial Court of Maine, 1874. 64 Me. 466.

BARROWS, J. The plaintiffs claim to recover a loss of $2,000 under a policy issued by the defendants upon a stock of fish scrap contained in the Atlantic Oil Company's Works in Boothbay.

* * * * * * * * * * * *

Maddox, a manufacturer of porgy oil and fish scrap, dry and

crude, in pursuance of negotiations with the plaintiffs looking to his furnishing them with large quantities of dried fish scrap, had received advances from the plaintiffs before the taking out of this policy to the amount of $2,000, and had the dried fish scrap on hand to an amount in value considerably exceeding the sum advanced by the plaintiffs.

As the fish scrap or porgy chum was not wanted by plaintiffs until the following season, it remained at the Oil Company's Works, not separated from that belonging to Maddox, under Maddox's agreement to store it for plaintiffs, free of expense, and deliver it when wanted, and to get it insured in order to secure the plaintiffs' advances.

In pursuance of this agreement Maddox told the agent of the defendant company that plaintiffs had scrap at Boothbay, that they had made advances to him to the amount of $2,000, and he wanted a policy to protect their interest in case of loss. He procured a policy on his own interest at the same time for a like amount. The cash value of the whole stock of fish scrap at the time of the insurance and of the fire was $5,000, and it was very nearly a total loss. No part of it had ever been delivered to plaintiffs, but Maddox stated fully to the agent of the insurance company the situation and condition of the stock "and the risk the company was taking just as it was."

He testified in substance that the porgy chum burned was the same upon which the plaintiffs had made the advancements to him; that there were 150 tons in the whole, of which he owned three-fifths and the Cumberland Bone Company two-fifths by virtue of the advances made him; that he held it for them to be delivered as wanted.

The insurance company paid the amount of the policy running to Maddox, but resisted the claims of the plaintiffs on the ground that Maddox had made no delivery to them, that the property in no specific part of the porgy chum had ever passed from Maddox to the plaintiffs, was not at their risk, and so they had no insurable interest.

If it were essential to the existence of an insurable interest that assured should have a legal title to the property upon which the insurance is effected, the case would present a different and perhaps more difficult question. But such is not the law. An equitable interest suffices. Chancellor Kent lays down the law

thus: "The interest need not be a property in the subject." "It may consist in having some relation or concern in the subject of the insurance, which relation or concern may be so affected by the peril as to produce damage."

The result is that a person so circumstanced that he is interested in the safety of a thing, derives a benefit from its existence and suffers prejudice from its destruction, has an interest in that thing which is the lawful subject of insurance. * * *

We think that the plaintiffs under the facts here developed had such an interest in the subject of insurance. Maddox was holding it in good faith in trust for them. He recognized the interest they had acquired in it by their advances, held it subject to their order, and procured the insurance in their name to protect their advances, refraining from insuring it in his own, and making known to Mr. Plummer, the defendants' agent, the situation and condition of the property, and the fact that advancements had been made to him thereon by the plaintiffs, and that the object of the policy was to protect those advances. It is true that so long as Maddox was solvent, the plaintiffs might not lose by the destruction of the property. But the same is true of every mortgagee or pledgee. We fail to see how the insurers could be injuriously affected, suppose it true that the agent understood that the part belonging to the plaintiffs had been separated, weighed off, and formally delivered. It does not appear that the risk they assumed was changed or affected.

FARMERS' MUT. INS. CO. v. NEW HOLLAND TURNPIKE ROAD CO.

Supreme Court of Pennsylvania, 1888. 122 Pa. 37, 15 Atl. 563.

GREEN, J. We cannot understand upon what principle evidence was admitted to prove loss of tolls on the turnpike road of the plaintiff. The contract in suit was a policy of fire insurance on a bridge. The bridge having been destroyed by fire, if there was liability on the part of the insurance company, the measure of that liability would be the value of the loss, which would consist of the injury to the bridge. If the bridge was totally destroyed, the loss would be the total amount of the in-

surance; but, if only partially destroyed, it would be the value of the injury. In no circumstances can there be a legitimate measure of liability on a fire insurance policy which represents the loss of profits of a business which might be carried on at the structure destroyed, if it were standing. Such is not the contract of the parties. Neither is there any liability, as for rent of the premises destroyed, or for any other advantage which may have been derived from its use. If a period of time elapses before the building is restored, or if it is never restored, the liability of the insurer is not for a loss of the use or rental of the building, but for the value of the loss, with interest on the same until payment is made. These fundamental principles, which are inherent in the contract of insurance, were disregarded when the plaintiff was permitted to prove the loss of tolls for non-user of the bridge while it was being rebuilt. * * *

We think it was also error to permit the county of Lancaster to interplead as a claimant. There was no contract of insurance with the county, and after intervening there could be no recovery as for any loss sustained by the county. There was no identity of interest in the bridge as between the turnpike company and the county. If the turnpike company had any interest in it, it was that interest which was represented by the amount of its contribution to the cost of the bridge; but in that contribution the county necessarily could have no interest. The whole of it belonged to the turnpike company, and no part of it, in any contingency, belonged to the county. The principle recognized in Mittenberger v. Beacon, 9 Pa. St. 198, has no application. * * *

The more important question, however, is whether the turnpike company had any insurable interest in the bridge. It is a novel question, but perhaps not difficult of solution. The basis upon which the insurable interest is claimed to exist is the fact that the turnpike company contributed $5,500 to the cost of erecting the bridge, being one-third its total cost, $16,500. If this contribution was compulsory—that is, legally compulsory—it would perhaps have to be admitted that an interest in the bridge, legal or equitable, would necessarily flow from it; for it cannot be supposed that the law would oblige any person or corporation to contribute directly to the cost of erecting a structure without conferring an interest in the structure which the law would recognize and enforce. While saying this, we do not, of

course, refer to that kind of contribution which is accomplished by the payment of taxes. Such contribution is, of course, for public use, and confers no title or interest upon the tax-payer in structures which may be erected with public funds. But in this case there is no pretense of any compulsion upon the turnpike company. The evidence as to the payment of the money is barren of information, except as to the mere fact of the payment. There is absolutely no testimony to prove why, or upon what consideration, or for what purpose or reason, the turnpike company paid any part of the cost of erecting the bridge. It is not difficult to imagine a reason, since, as the company's road crossed the stream over which the bridge was erected, it would be quite desirable for them to have a bridge over which persons using the road could travel. But while that might be a reason for the company building a bridge of its own, it was still the fact that the bridge was a public county bridge, free to all travel, built many years before by a private person, who transferred it to the county, and hence the property of the county exclusively. Being thus a free, public bridge, there could not possibly be any private estate or ownership in it. The turnpike company could charge no tolls for passing over it. They could exercise no acts of ownership over it. They could not obstruct it, nor take it down, even to rebuild it, without the consent of the county, and perhaps not even with such consent, as it was a part of the public highway. In point of fact, while the turnpike company did contribute the third part of the cost of its erection, after the former bridge had fallen down, the county at that time paid the other two-thirds of the cost, and re-erected the bridge in discharge of its undoubted legal obligation to do so. And so after its destruction by fire, in 1882, it was again rebuilt by the county as a public county bridge, in obedience to a general law of this commonwealth (act May 5, 1876, P. L. 112) and the decree of this court (Myers v. Com., 1 Atl. Rep. 264). All this was done without any cost to this plaintiff, who now enjoys the use of the bridge in the same manner and to the same extent as before the fire. The only injury the plaintiff has sustained by the fire is in being deprived of the use of the bridge, not as its own, but as a part of the public highway, during the period of the reconstruction of the bridge. But for that injury the defendant was not responsible in any sense, and it never assumed an obligation

to make compensation for it. The county was legally charged with the duty of rebuilding, and, however an argument might be made against the county for not performing its duty in that regard with promptness, it is perfectly manifest that the breach of that duty by the county conferred no right of action against the defendant insurance company.

What, then, remains to impose any liability upon the defendant? The bridge is restored without any expense to the plaintiff. Every right which the plaintiff enjoyed before the fire is enjoyed since, so far as the bridge is concerned, without any additional cost to the plaintiff. It may be remarked, in passing, that the right of the plaintiff in the bridge is only the public and common right of its patrons, as citizens, to use the bridge as a part of the public highway. It is therefore not a right peculiar to the plaintiff in any sense. It may well be questioned, even if the plaintiff had an insurable interest in the bridge, whether any injury has been sustained to that interest, sufficient to impose any liability upon the defendant as an insurer. Suppose a recovery is permitted, and the plaintiff recovers the amount of the insurance money. As they are not obliged to expend the money in reconstruction, and yet reconstruction has been accomplished without cost to them, they simply get back and keep the money they voluntarily contributed in 1868 in the construction of the bridge. But if the bridge had not burned down, that money could not have been recovered. How, then, were they injured by the fire? They have the bridge as they had it before, without cost to them; and the diminution of their tolls, during the period of reconstruction, cannot be compensated in an action on the policy. For this reason, therefore, if for no other, we cannot discover any cause of action against this defendant. But independently of this consideration, all the definitions of an "insurable interest" import an interest in the property insured which can be enforced at law or in equity. Thus we said in Miltenberger v. Beacon, 9 Pa. St. 199: "It is accordingly recognized as a rule, in this department of the law, that almost any qualified property in the thing insured, or any reasonable expectation of profit or advantage to spring from it, may be the subject of this species of contract, provided it be founded in some legal or equitable title." In 1 Wood, Ins. 625, 626, it is said: "A right, too, must be of such a nature, in order

to constitute an interest, as the law will recognize and enforce; for a mere moral title will not sustain an insurance." Fland. Ins. 388: "A mere general interest, not susceptible of enforcement, which does not specifically apply either in terms or by the operation of law, is not insurable." 1 Wood, Ins. 656: "The interest must be enforceable either at law or in equity." Wilson v. Insurance Co., 19 Pa. St. 374: "Interest in the property insured is an essential link in the relation of insurance." Sweeny v. Insurance Co., 20 Pa. St. 342: "The rule is valuable and well founded that he who has no interest can have no insurance. That he must show his interest, and that it is the extreme measure of his recovery, are the corollaries of the rule." Insurance v. Murray, 73 Pa. St. 28: "Hence the court was correct in charging that the insurable interest of the lessees was to the extent of the value of the property which they were bound to replace." See, also, Grevemeyer v. Insurance Co., 62 Pa. St. 340. It is unnecessary to multiply citations. There was clearly no interest in the bridge, belonging to the turnpike company, which could be recognized or enforced, either at law or in equity. There could not be any right of property of any kind, nor of possession nor of custody. Even the use of it was not a use by the plaintiff in its corporate capacity, but a mere right of passage over it, which belonged to all citizens in common. The money which was contributed to its construction by the plaintiff was a mere gratuity, which it was not bound to give, and which it could never recover. In such circumstances, there was no interest or property in the bridge as a structure, and hence no insurable interest capable of protection and enforcement. * * *

Insurable Interest in Lives.

RESERVE MUTUAL INS. CO. v. KANE.

Supreme Court of Pennsylvania, 1876. 81 Pa. 154.

[The plaintiff sought to recover on a policy of life insurance effected by him upon the life of his father, a laborer, whose passage money from Ireland had been paid by the plaintiff.]

PER CURIAM. By the 28th section of the Poor Law of June 13, 1876, the father and grandfather, and the mother and grand-

mother, and the children and grandchildren of every poor person not able to work, shall at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the Court of Quarter Sessions of the proper county shall order and direct. Maintenance of a father or mother unable to work is, therefore, a legal liability. When we add to this the feelings of natural affection and the desire produced by these feelings to provide for the comforts of parents, the right to effect an insurance on the life of the parent, to carry out these purposes, ought not to be denied. It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus both father and mother be cast upon the son; or if the father die before her, the necessity may fall at once upon the son. Why then should he not be permitted to make a provision, by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know, in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure but is founded in the best feelings of our nature, and on a legal duty which may arise at any time. We are of opinion that the policy is not void.

ULRICH v. REINOEHL.

Supreme Court of Pennsylvania, 1891. 143 Pa. 238, 13 L. R. A. 433.

PAXSON, C. J. This case is not free from difficulty. It has been twice argued, and has received a most careful consideration. It presents the question, to what extent a creditor may lawfully insure the life of his debtor. We have avoided ruling this point before, because it was one of grave importance, and the cases in which it was raised did not necessarily require it, nor did they present all the facts necessary to enable us to dispose of it satisfactorily. This record raises the whole question squarely.

The facts are substantially as follows: The defendants are doing a firm business at Lebanon, Pa., and hold a judgment against one Andrew Bleistine, in the court of common pleas of Lebanon county, which, with interest and costs, amounted to

$110.02. The judgment was sufficiently secured on real estate, and the defendants were not pressing their debtor for the money. He was being pressed by other creditors, who held subsequent liens on his property. It was necessary to quiet them for Bleistine to pay off the judgment held by the defendants, or get rid of it in some manner. Not having the money, he applied to the defendants to satisfy it, and take a policy on his life instead. The evidence is uncontradicted that the defendants were averse to this, and for a time declined, but finally yielded to Bleistine's entreaties, and his wife's tears, to save their home. The evidence shows that Bleistine offered them an insurance of $3,000 or $5,000 or $10,000 or any amount they wanted. The negotiation resulted in the defendants taking a policy of $3,000 on the life of Bleistine in the U. B. Mutual Aid Society. The policy was issued in the name of Bleistine as beneficiary, and afterwards assigned by him to the defendants, who paid the entrance fee and all subsequent assessments. The assignment was absolute, and not as collateral security, and the judgment referred to was satisfied of record. After Bleistine's death, the insurance money was paid by the company to the defendants. Subsequently this suit was brought by the executor of Bleistine to recover from them the amount received over the debt and interest and premiums paid; the plaintiff alleging that the amount of insurance was so disproportioned to the debt as to make it a gambling transaction, within the doctrine of Gilbert v. Moose, 104 Pa. St. 74, and the cases following it. * * *

The first and second assignments present the main question in the case. Upon the trial below, the defendants proved, under exception, the life expectancy of Bleistine, and the amount of assessments on this policy had he lived out his full life expectancy. It appears from this evidence that the insured was 42 years of age, and that his expectation of life, according to the Carlisle tables, was 26 years; that had he lived that length of time the interest on the judgment, with the annual dues and assessments and interest thereon, would have amounted to $4,336.31, being $1,336.31 in excess of the amount of the policy. This evidence was not contradicted. Its admission forms the subject of the first assignment. In the second assignment complaint is made that the learned judge erred in his answer to the plaintiff's sixth point. The point is as follows: "The amount

allowed and paid as the consideration of the transfer of the insurance, to-wit, the sum of $99.51, with interest thereon from December 7, 1875, to April 2, 1877, and the costs, were grossly inadequate, and the disproportion between that amount and the amount of the insurance ($3,000) is so great as to require the court to say, as matter of law, that the transaction was a wager, and that in this action Reinoehl & Meily have no right to retain more of the insurance money received by them than the amount of their satisfied judgment, with interest and costs, and the premiums and assessments paid by them, with interest thereon; and therefore the verdict of the jury must be in favor of the plaintiff for the amount received by the defendants, with interest from the date of its receipt, less the amount of the judgment, interest and costs, and assessments and premiums paid, with interest." This point was refused.

Whether the question of excess of insurance is to be disposed of by the court as a matter of law, or by the jury as a question of fact, it is essential that we should have a fixed rule. We have none now. I felt the importance of this in delivering the opinion of the court in Grant's Adm'rs v. Kline, 115 Pa. St. 618, 9 Atl. Rep. 150, where I said: "Speaking for myself, it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of premiums, with interest thereon, during the expectancy of life, as shown by the Carlisle tables. This view, however, has never been adopted by this court in any adjudicated case, nor do we feel compelled to define the disproportion now, in view of the particular facts of the case in hand." In the subsequent case of Cooper v. Shaeffer (Pa. Sup.), 11 Atl. Rep. 548, our Brother Sterrett, after quoting the above, remarked: "This appears to be a just and practicable rule." No such rule was established, however, in Cooper v. Shaeffer. In that case there was an insurance of $3,000 to cover a debt of $100, and this court said, through Mr. Justice Sterrett: "In view of the undisputed facts, the learned judge of the common pleas held that the disproportion between the insurance of $3,000 and the debt of $100 was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignors of the policy had no right to retain more of the insurance money recovered by them than the amount of the debt, plus the premiums paid and

interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law." We have no doubt that, in a proper case, where the facts are not disputed, it is the duty of the court to pronounce upon the character of the policy. Thus, in Grant's Adm'rs v. Kline, supra, it was said: "To take out a policy of $5,000 to secure a debt of five dollars would be such a palpable wager that no court would hesitate to declare it so as matter of law." It is true this remark was made by way of illustration, and we only refer to it for that purpose now. Cooper v. Shaeffer decided nothing but that particular litigation. It laid down no rule for the future beyond its own particular facts, viz., that an insurance of $3,000 for a debt of $100, unexplained, was a gambling policy. It may be asked why it does not rule this case, where the amount of insurance was the same, and a difference of a few dollars only in the amount of the debt. The answer is not difficult. Cooper v. Shaeffer was decided upon the single ground of the disproportion between the insurance and the debt. There were no facts in evidence by which this disproportion could be explained or shown to be justifiable. This appears by the report of the case, as well as from the opinion of Judge Simonton, who tried that as well as this case below. In refusing a new trial in the case in hand, that learned and able judge said, in reference to Cooper v. Shaeffer: "Even the age of the insured was not dwelt upon as an element of the problem, and there was not a word of evidence as to the expectancy of life or the probable amount of annual payments to be made. Here, however, these important matters were urged as a principal ground of defense, and required consideration. In our opinion, they necessarily carried the case to the jury, and abundantly justified the verdict. The defendants insured a healthy man of 42 years in the sum of $3,000, to protect a debt of $100. If he had merely lived out his expectancy, and no longer, they would have been obliged to pay for assessments and annual dues $2,436.32, to which, if interest be added, the amount of their investment would have been $4,336.31. In return they would have received $3,000, thus suffering a considerable loss. Surely, to call such a transaction 'speculation' is to misuse the word. That it happened to be profitable, because the insured died within a few years, is manifestly not to the point." I have

quoted this extract at length, because I could in no better way emphasize the distinction between Cooper v. Shaeffer and the case in hand.

The law very properly lays a mailed hand upon speculative life insurance. Of all the forms of gambling, it is one of the most objectionable. The records of our own court show that it sometimes leads to murder. The holder of a policy upon a life in which he has no interest, either of a social or pecuniary nature, has a strong interest in the death of the assured. This interest grows and strengthens with each payment of premium. He has made a bid upon the life of another person. A man who will engage in such a transaction cannot safely be regarded as a saint. He sees with growing impatience that life prolonged from year to year, and his money slipping away in premiums. A man thus situated soon becomes familiar with the thought of the death of the person who stands between him and what, in his morbid fancy, he may regard as his rights. That crime follows in some instances is a fact of which we have judicial knowledge. All life insurance is in one sense speculative, yet within proper restrictions it has been found to be highly beneficent, and not in conflict with public policy. It enables a man in the days of his early struggles to provide for his family in case of his death. It renders it possible for a business man to borrow the capital needed for success. It furnishes the means, and the only means, by which a creditor may sometimes secure a doubtful claim. Yet in all these cases there is the element of speculation, for, if the assured dies shortly after the policy is issued, the beneficiary, whether he be a blood relation or a creditor, gets a sum of money greatly disproportioned to the amount paid. But in these cases the law does not regard the speculative element as one of danger. It is true that a son who takes out a policy on the life of his father, or a creditor upon the life of his debtor, may have an interest in the death of the assured, and resort to crime to procure it; but experience shows that such instances are extremely rare, and the temptation no greater than in thousands of other instances in which one person may be benefited pecuniarily by the death of another. But a policy taken out by one who has no interest, either as a creditor or a relative, in the life of the assured, is always a danger signal.

It is settled law that a creditor has an insurable interest in the life of his debtor, but up to this time there is no decision as to the limit of this right. Our own cases furnish us no settled rule, and for this reason I do not think it necessary to review them. Each case has been decided upon its own facts. In Cooper v. Shaeffer, as before observed, it was said the insurance was too large. In Grant's Adm'rs v. Kline, on the other hand, we held that the amount of insurance was not disproportioned to the debt. We have now reached a point where it is necessary to lay down some fixed rule by which such cases can be disposed of in the future; otherwise the rulings of the courts and the verdicts of juries upon such questions will be arbitrary; and where there is nothing in a case but the amount of the insurance and the amount of the debt it is impossible for either a court or a jury to arrive at a correct result. Starting out with the conceded proposition that a creditor has an insurable interest in the life of his debtor, and may lawfully take out a policy thereon, it follows logically that he may take out the policy in such a sum as may reasonably secure the debt. It needs no argument to show that, if my debtor owes me $1,000, a policy for $1,000 would be inadequate; for, if my debtor dies within 24 hours after the policy is taken out, I am a loser by the amount of the premium paid, and it would be but a few years before the interest on the debt and the premiums would exceed the debt. Every future payment then would be a loss, with the only alternative of adding to this loss year by year, or abandoning the policy altogether, and sinking the whole amount paid. It seems clear, upon reason, that the creditor may take out a policy in excess of his debt. But to what excess? The answer to this question obviously depends upon circumstances. An important element in the consideration of this question is the age of the assured. The difference between a policy on the life of a man 25 years of age and one of 75 is clear to the dullest understanding. The assured was only 42 years of age, and his expectancy of life was 26 years. The chances were greatly in favor of his living out his expectancy. The Carlisle tables were prepared with care, by competent experts, and are the result of actual experience. I am therefore justified in saying that the chances were in favor of the assured living out his expectancy, in which case there would be the loss of interest on the debt for 26 years added to the dues

and assessments, with interest thereon, for the same period. The evidence shows that in such event the defendants would have been losers by a considerable sum. In fact, I infer from the tables furnished that after about 17 years the defendants would have carried this policy at a loss. The defendants assumed this risk when they took out the policy. They also had the chance of the assured not living out his expectancy. This is a risk which an insurance company assumes upon every policy which it issues. In a particular instance the assured may live many years beyond his expectancy, which is a large gain to the company; but this gain is equalized by the loss in instances where the assured dies before the expiration of his expectancy, so that in the vast volume of business of such corporations the average result is reasonably uniform. But the holder of a single policy can have no average result. He takes the risk, with the chances fairly balanced. Had these defendants taken out 100 policies on the lives of as many debtors, it is more than probable that some of them would have largely exceeded their expectation, while others would not have reached it. In such case there would not have been material gain or loss. Had the assured lived out his expectancy of life, no question would probably have arisen as to the right of the defendants to retain the whole of the money. It could not, then, have been successfully assailed as a gambling transaction. I submit that the character of the contract cannot depend upon results or the accident of death. If not lawful in its inception, it could never become so.

In order to ascertain whether an insurance is disproportioned to the debt, regard must be had to the age of the assured, his expectation of life, and the cost of carrying the insurance, with interest thereon, as well as upon the amount of the debt. The evidence which forms the subject of the first assignment was not only proper, but essential, to an intelligent understanding of the case. It is just what was lacking in Grant's Adm'rs v. Kline, and was one of the reasons why we avoided deciding the broad question in that case. But any one who reads that opinion between the lines can see that the judicial mind must have been influenced to some extent by the suggestion in reference to the Carlisle tables. The rule we now announce may not be the best, but we have not been able to find a better, after a most careful and anxious consideration of the question. That it will not pro-

duce exact justice in all cases is possible. There will always be cases of individual hardship in the application of all general rules. No general rule can be made to fit each particular case; otherwise it would cease to be a rule. My attention was especially called to this difficulty by the following extract from the opinion of the learned judge below in refusing a new trial: "With much respect, it is suggested that the principle indicated in Grant's Adm'rs v. Kline, 115 Pa. St. 625, 9 Atl. Rep. 150, and Cooper v. Shaeffer, supra, as the proper rule to determine for what sum a creditor's policy should be taken out, ought to be somewhat expanded before it is positively adopted. As now stated, it would not provide for a case like this, where the policy is taken out in a company which levies annual [monthly?] assessments, and where, therefore, allowance must be made in the creditor's forecast for possible fluctuations. Neither would it now provide for the not infrequent contingency of the insured outliving his expectancy. Under the present form of the indicated rule, the creditor must always lose if the debtor lives beyond his expectancy; and it cannot be accurately applied to assessment insurance, because in this variety of the business the annual payments are not a previously known and certain sum."

We have no difficulty in disposing of the objection that the rule does not provide for the case of the assured living beyond his expectancy, and thus entailing a loss upon the creditor. If we go beyond the expectancy, where are we to stop? A man may live to the age of a hundred, and such length of days is of frequent occurrence. To sanction a policy covering such a period, and yet to allow the holder to recover the full amount in case of death within a year, would be a retrograde step in our decisions. Under such a system, the creditor would be absolutely secure, with the possibility of an enormous gain in case of an early death; whereas at present, as I have endeavored to show, the risk of a debtor's exceeding his expectancy is equalized by the possibility of his death within it, and in a given number of cases the result produces uniformity. The want of uniformity is not the fault of the rule, but of its application to a single case.

There is more difficulty in the other objection. The policy in question, however, was taken out in a mutual company, where assessments are made from time to time, and there appears to have been no difficulty upon the trial below in ascertaining with

sufficient accuracy the amount of assessments which the defendants would have been called upon to pay had the assured lived out his expectancy. The precise amount of such assessments cannot, of course, be estimated with the same accuracy as in the case of a company in which the annual premium is a fixed sum. But the assessments, even in a mutual company, can be approximated by the experience of other similar companies with sufficient accuracy to base an insurance upon it; and, where a policy has been taken out in good faith by a creditor, the law does not exact impossibilities. A slight mistake, one way or the other, owing to the condition of the company's business, by which assessments are increased or diminished, would not necessarily vitiate a policy. The cost of life insurance, by whatever system adopted, it is believed, does not vary so greatly as to prevent a reasonable approximation thereof. It may be that few men would take out a life policy to secure a debt of $100, where there is an expectancy of life for 26 years, and pay an annual assessment or premium in excess of the whole amount of the debt. But we do not pass upon the wisdom of contracts. We only consider their legality, and care must be taken in the enforcement of an admittedly sound rule of public policy not to impinge upon the right of the citizen to contract. In this instance the contract was lawful, and the defendants appear to have entered into it, not so much for their own benefit as for the accommodation of the assured. We are not to measure its legality by its results, but by its surroundings at the time it was made. We are of opinion that a creditor may lawfully take out a policy on the life of his debtor in an amount to cover the debt, with interest, and the cost of such insurance, with interest thereon, during the period of the expectancy of life of the assured, according to the Carlisle tables. * * *

Time When Interest Must Exist.

CONNECTICUT MUT. L. INS. CO. v. SCHAEFER.

Supreme Court of the United States, 1876. 94 U. S. 457.

[A husband and wife effected insurance upon their joint lives, payable to the survivor upon the death of either. They were subsequently divorced. The plaintiff, the wife, paid the premiums

until the death of the husband, and then brought this suit on the policy.]

BRADLEY, J., delivered the opinion of the court. * * * The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest, or to the question whether the cessation of interest avoids a policy good at its inception. We do not hesitate to say, however, that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insured's interest, unless such be the necessary effect of the provisions of the policy itself. Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred. And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.

But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms. This is more manifest where the consideration is liquidated by a single premium paid in advance than where it is distributed in annual payments during the insured life. But, in any case, it would be very difficult, after the policy had continued for any considerable time, for the courts, without the aid of legislation, to attempt an adjustment of equities arising from a cessation of interest in the insured life. A right to receive the equitable value of the policy would probably come as near to a proper adjustment as any that could be devised. But if the parties themselves do not provide for the contingency, the courts cannot do it for them. * * *

CHAPTER III.

CONCEALMENT, REPRESENTATIONS AND WARRANTIES.

PHOENIX MUT. LIFE INS. CO. v. RADDIN.

Supreme Court of the United States, 1887. 120 U. S. 183.

GRAY, J. This was an action brought by Sewell Raddin, and prosecuted by his administrator, upon a policy of life insurance dated April 25, 1872. * * *

The application was signed by Sewell Raddin, both for his son and for himself, and contained 29 printed "questions to be answered by the person whose life is proposed to be insured, and which form the basis of the contract," three of which, with the written answers to them, and the concluding paragraph of the application, were as follows:

"(10) Is the party addicted to the habitual use of spirituous liquors or opium?" Ans. No.

"(28) Has any application been made to this or any other company for insurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy." Ans. $10,000, Equitable Life Assurance Society.

"(29) Is the party and the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the health, habits, or circumstances of the party to be assured, will vitiate the policy, and forfeit all payments thereon?" Ans. Yes. * * *

The rules of law which govern the decision of this question are well settled, and the only difficulty is in applying those rules to the facts before us. Answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and lit-

erally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant. Moulor v. American Ins. Co., 111 U. S. 335; S. C. 4 Sup. Ct. Rep. 466; Campbell v. New England Ins. Co., 98 Mass. 381; Thomson v. Weems, 9 App. Cas. 671.

The misrepresentation or concealment by the assured of any material fact entitles the insurers to avoid the policy. But the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract. Carpenter v. Providence Washington Ins. Co., 16 Pet. 495; Jeffries v. Life Ins Co., 22 Wall. 47; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Macdonald v. Law Union Ins. Co., L. R. 9 Q. B. 328; Edington v. Ætna Life Ins. Co., 77 N. Y. 564; S. C. 100 N. Y. 536, and 3 N. E. Rep. 315.

Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application. Cazenove v. British Equitable Assurance Co., 29 Law J. C. P. (N. S.) 160, affirming S. C. 6 C. B. (N. S.) 437. But where upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully, immaterial. Connecticut Ins. Co. v. Luchs, 108 U. S. 498; S. C. 2 Sup. Ct. Rep. 949; Hall v. People's Ins. Co., 6 Gray, 185; Lorillard Ins. Co. v. McCulloch, 21 Ohio St. 176; American Ins. Co. v. Mahone, 56 Miss. 180; Carson v. Jersey City Ins. Co., 43 N. J. Law, 300; S. C. 44 N. J. Law, 210; Lebanon Ins. Co. v. Kepler, 106 Pa. St. 28.

The distinction between an answer apparently complete, but in fact incomplete, and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one

applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage, when in fact there are two, the policy issued thereon is avoided. Towne v. Fitchburg Ins. Co., 7 Allen, 51. But if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount. Nichols v. Fayette Ins. Co., 1 Allen, 63. * * *

The twenty-eighth printed question in the application consists of four successive interrogatories, as follows: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already assured in this company, state the No. of policy." The only answer written opposite this question is "$10,000, Equitable Life Assurance Society." The question being printed in very small type, the answer is written in a single line midway of the opposite space, evidently in order to prevent the ends of the letters from extending above or below that space; and its position with regard to that space, and to the several interrogatories combined in the question, does not appear to us to have any bearing upon the construction and effect of the answer. But the four interrogatories grouped together in one question, and all relating to the subject of other insurance, would naturally be understood as all tending to one object,—the ascertaining of the amount of such insurance. The answer in its form is responsive, not to the first and second interrogatories, but to the third interrogatory only, and fully and truly answers that interrogatory by stating the existing amount of prior insurance, and in what company, and thus renders the fourth interrogatory irrelevant. If the insurers, after being thus truly and fully informed of the amount and the place of prior insurance, considered it material to know whether any unsuccessful applications had been made for additional insurance, they should either have repeated the first two interrogatories, or have put further questions. The legal effect of issuing a policy upon the answer as it stood was to waive their right of requiring further answers as to the particulars mentioned in the twenty-eighth question, to determine that it was immaterial, for the purposes of their contract, whether any

unsuccessful applications had been made, and to estop them to set up the omission to disclose such applications as a ground for avoiding the policy. The insurers, having thus conclusively elected to treat that omission as immaterial, could not afterwards make it material by proving that it was intentional. * * *

The expression at the beginning of the policy, that the insurance is made "in consideration of the representations made in the application for this policy," and of certain sums paid and to be paid for premiums, does not make those representations part of the consideration, in the technical sense, or render it necessary or proper to plead them as such.

Judgment affirmed.

CHAPTER IV.

SUBROGATION.

Nature of the Right of the Insured Against the Third Party.

MICHAEL v. PRUSSIAN NAT. INS. CO.

Court of Appeals of New York, 1902. 171 N. Y. 25, 63 N. E. 810.

[Action on an insurance policy, insuring the use and occupancy of a grain elevator. The insured had entered into a pooling arrangement with other elevator companies, by the terms of which, notwithstanding the destruction of his elevator by fire, he should receive a certain percentage of a common fund into which a considerable portion of the earnings of the elevator were placed. The insurer appealed from a judgment in favor of the insured.]

GRAY, J. * * * The appellant's claim to be entitled, by application of the equitable doctrine of subrogation, to be credited with a proportionate share of the percentages or moneys received by the plaintiff from the association, in reduction of its liability upon the policy, is not a tenable one. This claim, obviously, again assumes that the subject of insurance was the earnings and income of the elevator plant. It is not that, and therefore the appellant is not concerned with the arrangement made by the assured with respect to their disposition. The Western Elevating Association might, conceivably, with better appearance of right, prefer the claim to be subrogated as to the insurance moneys, in order to recoup itself for the moneys paid over to its disabled member; but how the appellant can be heard to claim the application of the doctrine of subrogation it is difficult to perceive. It has certainly not paid the loss, and the loss was not one which was to be made good, as such, by the association. During the season of navigation percentages were earned in a general fund, created by "pooling" the common earnings, and they were to be paid over under all conditions, and notwithstanding that the elevator might be destroyed, and the general fund diminished in consequence. I think the principle of the decision of Foley v.

Insurance Co., 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664, relied upon at the appellate division as to this point, is applicable. There the policy was upon some dwelling houses in course of construction, and they were destroyed by fire. The contractors for their erection were obligated to complete them before becoming entitled to be paid for the materials and work. It was held that the insurance company was not concerned with the contract relations between the plaintiff and the contractors. It was said that: "It is possible that, if the defendant is compelled to pay the policy, the plaintiffs may, if they insist upon their rights against the contractors, get double compensation, unless they should be adjudged to hold the fund recovered for the contractors. But, however that may be, the owners had an insurable interest in the whole value of the buildings on their land, and the defendant neither can compel the plaintiffs to put the loss on the contractors, nor can they resort to the terms of the building contract to diminish the liability for an actual loss within the terms of the policy." Again, it was observed that, though the owner "may recoup his losses by reason of a contract liability of a third person, [it] in no way affects the liability of an insurer, in the absence of an exemption in the policy." The case is very much in point as an authority for the disposition of this appeal. The theory of the right of subrogation rests upon the fact that the assured has a claim against a third party for the loss which has been sustained in the destruction of the property insured. That is not the case with the plaintiff, who did not receive his payment from the "pooling" fund because or in consideration of the loss, but under an arrangement which had secured to members of the association certain percentages, under all conditions, as a consideration of entering into it. * * *

Nature of the Insured's Right Against the Insurer.

UNITED STATES v. AMERICAN TOBACCO CO.

Supreme Court of the United States, 1897. 166 U. S. 468.

Appeal from Court of Claims.

This action was brought in the Court of Claims for the purpose of recovering the value of certain internal revenue stamps alleged to have been destroyed by fire before they had been used.

On the 27th of May, 1895, the American Tobacco Company

filed its petition in the Court of Claims, in its own name, for the use of certain insurance companies named in the petition, to recover the value of the stamps destroyed by fire in its factory. The facts as to the loss and destruction of the stamps were set forth, and judgment asked for the value thereof. The usual general denial of all the allegations of the petition was filed by the attorney general on behalf of the United States, and the case went to trial, and after the evidence had been submitted the court found the following facts: That the tobacco company was a manufacturer of tobacco, occupying a building in New York City, which was established solely as a manufactory; no sales of tobacco being made at the factory; the shipments therefrom being made in bulk after the tobacco had been stamped according to law. On the 2d of April, 1893, the factory and its entire contents were destroyed by fire. Among those contents were internal revenue stamps of the United States of the face value of $4,100.10. These stamps had been purchased by the company from the United States collector of internal revenue for use in the factory. Some of the stamps were unattached to packages of tobacco, and had never been used, and they were of the face value of $1,356.63. The balance of the stamps, of the face value of $2,743.47, had been attached to packages of tobacco which had not been sold or offered for sale, or removed from the factory for sale. The tobacco company had purchased and paid for these stamps, which were totally destroyed, and there were no unsettled claims against the company on behalf of the United States.

* * * * * * * * * * * *

The contents of said factory were insured to the American Tobacco Company, by the insurance companies for whose use this suit is brought, in the full sum of $139,500. The total loss by fire, as adjusted and settled with said claimant, was $78,635.47, which sum said companies have paid to the American Tobacco Company in proportions as the face of their several policies bears to the whole sum insured. The face value of said United States internal revenue stamps destroyed as aforesaid, namely, $4,100.10, was a part of the sum so paid by said insurance companies.

PECKHAM, J., after stating the facts, delivered the opinion of the court.

Three assignments of errors alleged to have been made by the court below have been filed on the part of the government, as follows:

"(1) In holding that the use appellees had an equitable claim against the appellant, which could be enforced by a suit in the name of the nominal appellee." * * *

It is argued upon the part of the government that, as the insurance companies have paid the tobacco company in full for the value of the stamps destroyed by fire, they have thereby become the actual plaintiffs in this suit, and as the connection of the tobacco company is merely nominal, the case must therefore be decided as one between the United States and the insurance companies. Dealing with the companies in that light, it is further urged that their right to sue is based upon the ground that they are subrogated to the rights of the tobacco company, and consequently, if there be no right of subrogation, there is no right of recovery; there is no right of subrogation, because there was no insurable interest in the stamps on the part of the tobacco company; and there was no insurable interest, because the tobacco company could obtain from the government either other stamps in lieu of the stamps destroyed, or the amount or value thereof, upon giving satisfactory evidence of the necessary facts to the commissioner of internal revenue, and therefore the tobacco company was not liable to suffer any loss, and, as a consequence, had no insurable interest in the stamps.

The argument, as we think, is not well founded. The case is not to be treated or decided as one between the United States and the insurance companies. On the contrary, the rights of the companies, as between them and the government, are not the subject-matter of the suit. The insurance companies, as such, have no right of action against the government. It is the right of the claimant, the tobacco company, which is to be passed upon; and, unless that company has a legal cause of complaint, no recovery can be had in this suit. The companies must recover in the name of the tobacco company, and by reason of its rights. Hall v. Railroad Co., 13 Wall. 367, 372, and cases cited.

The suit is properly brought in the name of the insured for the use of the insurers, but the cause of action rests on the rights of the owner. Id.; Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 321, 6 Sup. Ct. 750, 1176, and cases cited.

Payment to the owner by the insurer does not bar the right against another party originally liable for the loss, but the owner, by recovering payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of his right to recover in his name. Insurance Co. v. Bosher, 39 Me. 253, 255.

The question then arises as to what right, if any, the tobacco company has under the statute above cited, when it appears that the company has received payment from the insurance companies for the value of the stamps destroyed. Is that fact a bar to its right to claim payment under that section in a case where the recovery is sought for the purpose of reimbursing the insurance companies for the payment made by them, to the extent of the value of the stamps?

We think, upon the facts found by the court of claims, the action can be maintained, and the payment by the insurance companies constitutes no bar. * * *

CASTELLAIN v. PRESTON.

Court of Appeal, 1883. L. R. 11 Q. B. D. 380 (Eng.).

The following statement of the facts in this case appears in the opinion of Lord Justice Cotton:

In this case the appellant's company insured a house belonging to the defendants, and before there was any loss by fire the defendants sold the house to certain purchasers. Afterwards there was a fire, and an agreed sum was paid by the insurance office to the defendants in respect to the loss. The appellant apparently seeks to recover the sum which the office paid to the defendants, and if the plaintiff's claim could be shaped only in this form, I think my opinion would be against him. The plaintiff's claim may be treated in substance in another way—namely, the company seek to obtain the benefit, either wholly or partly, of the amount paid by them out of the purchase money which the defendants have received since the fire from the purchasers. In my opinion, the plaintiff is right in that contention.

BRETT, L. J. * * * I have mentioned the doctrine of notice of abandonment for the purpose of coming to the doctrine of subrogation. That doctrine does not arise upon any of the

terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favor of the underwriters or insurers, in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. It is not, to my mind, a doctrine as applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties, but that again is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is, whether that doctrine as applied in insurance law can be in any way limited. Is it to be limited to this, that the underwriter is subrogated into the place of the assured so far as to enable the underwriter to enforce a contract, or to enforce a right of action? Why is it to be limited to that, if when it is limited to that, it will in certain cases enable the assured to recover more than a full indemnity? The moment it can be shown that such a limitation of the doctrine would have that effect, then, as I said before, in my opinion, it is contrary to the foundation of the law as to insurance, and must be wrong. And, with the greatest deference to my Brother Chitty, it seems to me that that is the fault of his judgment. He has by his judgment limited this doctrine of subrogation to placing the insurer in the position of the assured only for the purpose of enforcing a right of action, to which the assured may be entitled. In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used; that is to say, the insurer must be placed in the position of the assured. Now, it seems to me, that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express—namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has

accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words "of every right of the assured." I think that the rule does require that limit. * * * The contract in the present case, as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from this contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine—namely, that the assured can recover a full indemnity, but shall never recover more, except, perhaps, in the case of the suing and laboring clause under certain circumstances—it is necessary that the plaintiff in this case should succeed. The case of Darrell v. Tibbits, 5 Q. B. D. 560, has cut away every technicality which would prevent a sound decision. The doctrine of subrogation must be carried out to the full extent, and carried out in this case by enabling the plaintiff to recover. * * *

RAYNER v. PRESTON.

Supreme Court of Judicature, 1881. L. R. 18 Ch. D. 1 (Eng.).

The following statement of facts is taken from the opinion of Lord Justice Cotton:

The plaintiffs purchased from the defendants a messuage and workshops. Between the date of the contract and the time fixed for completion, the buildings purchased were injured by fire. The vendors had before the contract insured the buildings against fire, but there was not in the contract any mention of this fact or of the policy. The plaintiffs brought an action to establish their right to a sum received by the vendors from the insurance office, or to have it applied in or towards reinstating the buildings injured. The Master of the Rolls decided against their claim, and from this decision the plaintiffs appealed.

BRETT, L. J. * * * It seems to me that the question raised between the plaintiffs and the defendants calls upon us to consider, first of all, the nature of a policy of fire insurance; and, secondly, what was the relation with regard to the policy and to the property between the plaintiffs and the defendants in this case. Now, in my judgment, the subject-matter of the contract of insurance is money, and money only. The subject-matter of insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only. The only result of the policy, if an accident which is within the insurance happens, is a payment of money. It is true that, under certain circumstances, in a fire policy there may be an option to spend the money in rebuilding the premises; but that does not alter the fact that the only liability of the insurance company is to pay money. The contract, therefore, is a contract with regard to the payment of money, and it is a contract made between two persons, and two persons only, as a contract.

In this case there was a contract of insurance made between the defendants and the insurance company. That contract was made by the defendants, not on behalf of any undisclosed principal, not on behalf of anyone interested other than themselves. The contract was made by the defendants solely and entirely on their own behalf, and at a time when they had no relation of any kind with the plaintiffs. It was a personal contract between the defendants and the insurance office, to which they were the sole parties. It is true that under certain circumstances a policy of insurance may, in equity, be assigned so as to give another person a right to sue upon it; but in this case the policy of insurance, as a contract, never was assigned by the defendants to the plaintiffs. It would have been assigned by the defendants to the plaintiffs if it had been included in the contract of purchase, but it was not. Any valuation of the policy, any consideration of increase of the price of the premises in consequence of there being a policy, was wholly omitted. There was nothing given by the plaintiffs to the defendants for the contract. The contract, therefore, neither expressly nor impliedly, was assigned to the plaintiffs; and, so

far as regards the contract of insurance, there never was any relation of any kind between the plaintiffs and the defendants.

But there did exist a relation between the plaintiffs and the defendants, not with regard to the subject-matter of the contract, but with regard to the subject-matter of the insurance. There was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a court of equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions: first of all, whether the title is made out, and, secondly, whether the money is ready; and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now, it has been suggested that when that takes place, or when a court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a

contract of sale and purchase of which a court of equity will under certain circumstances decree a specific performance. But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow that anything under the contract of insurance would pass. As I have said, the contract of insurance is a mere personal contract for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree that upon the completion of the purchase the policy be handed over. But that is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it.

I therefore, with deference, think that the plaintiffs here cannot recover from the defendants, on the ground that there was no relation of any kind or sort between the plaintiffs and the defendants with regard to the policy, and therefore none with regard to any money received under the policy. * * *

HALL & LONG v. THE RAILROAD COMPANIES.

Supreme Court of the United States, 1871. 13 Wall. 367.

Hall & Long allowed this suit in their names, for the use of certain insurance companies, against the Nashville and Chattanooga Railroad Company, to recover the value of cotton shipped by them on the road of the defendant as a common carrier, which was accidentally consumed by fire, while being transported, and "became and was a total loss." The cotton had been insured by Hall & Long against loss by fire, in the companies for whose use the suit was brought, and these companies had paid the amount insured by them, respectively.

STRONG, J., delivered the opinion of the court. * * * It had been argued, however, that these decisions rest upon the doctrine that a wrongdoer is to be punished; that the defendants against whom such actions have been maintained were wrongdoers; but that, in the present case, the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and, therefore, that they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though

often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance; and when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent in fact, he has consented by his contract to be dealt with as if he were not so. He does not stand, therefore, on the same footing with that of an insurer who may have entered into his contract of indemnity, relying upon the carrier's vigilance and responsibility. In all cases, when liable at all, it is because he is proved, or presumed to be, the author of the loss. There is nothing, then, to take the case in hand out of the general rule, that an underwriter, who has paid a loss, is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss.

When Does the Right Accrue?

PHOENIX INS. CO. v. FIRST NAT. BANK.

Supreme Court of Appeals of Virginia, 1889. 85 Va. 765, 8 S. E. 719.

RICHARDSON, J. This is an appeal from a decree of the circuit court of Rockingham county, rendered June 30, 1887, in the chancery cause therein pending in which the Phoenix Insurance Company of New York, the Fire Association of Philadelphia, and the Hope Insurance Company of New Orleans were complainants, and the First National Bank of Harrisonburg, Va., was defendant. A corporation styled the "New Rawley Springs Company" issued its bonds to the amount of $30,000, dated July 12, 1879, with coupons for semi-annual interest, and executed a trust deed to secure payment thereof. These bonds, to the amount of $7,187, were, on the 10th of August, 1885, owned by the defendant bank, and that day the bank obtained from the Phoenix Insurance Company a policy of insurance against loss by fire to

the amount of $1,000, for the term of one year, in part of the buildings and furniture embraced in the trust deed. The policy was issued in the name of the Springs Company, though the bank paid the premium; the loss, if any, being payable to the bank, as its interest might appear. On the 7th of June, 1886, the items of property covered by the policy were destroyed by fire, the loss aggregating $700, which was paid, and the policy surrendered. The bank also took out additional policies in the Virginia Fire & Marine Insurance Company for $2,750, in the Hope Insurance Company of New Orleans for $1,500, and in the Fire Association of Philadelphia for $1,750, making a total insurance of $7,000, to protect the bonds. The losses under the several policies were: Phoenix, $700; Fire Association, $1,375; Hope, $1,050; and Virginia Fire & Marine, $2,375,—aggregating $5,500. When the Phoenix Insurance Company paid the bank the amount of the loss under its policy, it demanded of the bank $700 of said bonds, claiming that it stood in the relation of surety; and that, having paid $700 of the debt of the Springs Company represented by the bonds, it had become entitled, on the principle of subrogation, to bonds to that amount. This claim being denied by the bank, the Phoenix Insurance Company filed its bill for relief. The bank demurred to and answered the bill, denying the complainant's demand. Then the Fire Association and the Hope Insurance Company, by leave of the court, filed their petition to the same effect. These two companies had not paid the losses under their policies, declining to do so until the bonds they claimed were turned over to them. In vacation, on the 30th of June, 1887, the court decreed that the complainants were not entitled to demand and take of the bank the bonds, or any of them, until the bank had received the full amount of the principal and interest of its debt; but that the insurance companies which have or shall have paid the bank the amount of adjusted loss due from them, respectively, were entitled in equitable proportions to such surplus of the dividends applicable to said bonds owned by the bank as may arise upon the foreclosure of the trust deed, and remain after the payment of principal and interest of said bonds to the bank, and that the prayer of the complainants be denied, and that the right of the bank to hold and collect the bonds was firm and stable. From this decree the Phoenix Insurance Company and the other complainants appealed to this court.

We have had no hesitancy in coming to the conclusion that the decree complained of is without error, either on principle or authority. The case involves only one single question: Does an insurer, who has paid a loss to a mortgagee that covers only a part of the mortgage debt, acquire, as against the mortgagee, a right to demand and take from the mortgagee the evidences of the debt secured to the amount of the loss paid by the insurer, whether the mortgagee be able or not to obtain satisfaction of his debt from the remaining evidences of the debt? or, in other words, must not the creditor's debt be paid in full before the insurer can take from him, by subrogation, any part of that debt? The doctrine which is applicable to this case, and which squarely meets this question, is clearly laid down by Mr. Justice Story in pronouncing the opinion of the Supreme Court of the United States in Carpenter v. Insurance Co., 16 Pet. 501, where the learned judge says: "No doubt can exist that the mortgagor and the mortgagee may each separately insure his own distinct interest in the property. But there is this important distinction between the cases, that, where the mortgagee insures solely on his own account, it is but an insurance of his debt, and, if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation, and, even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. But then, upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances." And in Insurance Co. v. Stinson, 103 U. S. 25, Mr. Justice Bradley concludes the opinion with the remark: "After a loss has occurred, and the insurance has been paid sufficient to discharge the debt, the insurers may be entitled to be subrogated to the rights of the creditor against the debtor." In a note to King v. Insurance Co., 54 Amer. Dec. 696, the learned annotator says: "The doctrine of the principal case, that the insurer is not entitled to demand such subrogation or assign-

ment under a policy, * * * which does not expressly provide for it, is the established law of Massachusetts, * * * and that doctrine seems to be adopted in May, Ins. § 456; Wood, Ins. 782; and in later editions of Mr. Phillips' work (2 Phil. Ins. § 1712). But it must be admitted that the decided preponderance of authority is against this doctrine, and in favor of the insurer's right of subrogation and assignment in such cases upon paying the loss, and, if necessary, the balance due on the mortgage." Citing Fland. Ins. 400; Carpenter v. Insurance Co., 16 Pet. 495; and numerous other authorities. The authorities demonstrate the correctness of the decree appealed from, and we are therefore of opinion that the same must be affirmed.

Right as Affected by Acts of the Insured.

WAGER v. PROVIDENCE INS. CO.

Supreme Court of the United States, 1893. 150 U. S. 99.

[H. Morse & Co. shipped grain by common carrier and insured the grain in favor of "the owner, advancer or common carrier."]

SHIRAS, J., delivered the opinion of the court. * * *

It is contended that the insurance companies, having paid the loss to the owners of the cargo, are entitled to be subrogated to the rights of the assured against the carriers.

It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the will incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for nonperformance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar

principles of equity. It is the right of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. Hall v. Railroad Co., 13 Wall. 369.

But it is equally well settled that the right, by way of subrogation, of an insurer, upon paying for a total loss of the goods insured, to recover over against the carrier, is only that right which the assured has, and that accordingly when a bill of lading provides that the carrier, when liable for the loss, shall have the full benefit of any insurance that may have been effected upon the goods, this provision is valid, as between the carrier and the shipper, and that therefore such provision limits the right of subrogation of the insurer, upon paying the shipper the loss, to recover over against the carrier. Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 6 Sup. Ct. Rep. 750, 1176; St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 11 Sup. Ct. Rep. 554.

If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he (the carrier) shall have the benefit of any insurance, it would seem to be clear that, where the carrier is actually and in terms the party insured, the underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier.

SOUTHARD v. MINNEAPOLIS, ST. P. & S. M. RY. CO.

Supreme Court of Minnesota, 1895. 60 Minn. 382, 62 N. W. 442.

[William B. Southard, the plaintiff, shipped goods by the defendant railroad and insured them. The goods were lost in transit. The insurer paid the plaintiff for the loss on condition that it, the insurer, should have the right to proceed against the carrier. Further facts appear in the following extract from the opinion of the court.]

COLLINS, J. * * * In the bills of lading—although not in the receipts, we notice—it was stipulated that in case of loss,

detriment, or damage to the flour while in transit the carrier liable for such loss, detriment, or damage should have the full benefit of any insurance which might have been effected on the same. In the policy of insurance issued to the consignor—some time prior to the delivery of the flour to the defendant—for the benefit of all parties concerned, was a condition "that, in case any agreement be made by the insured with any carrier by which such carrier stipulates to have, in case of any loss for which he may be liable, the benefit of this insurance, then, and in that event, the insurers shall be discharged of any liability for such loss hereunder"; so that, by reason of the stipulation in the bills of lading, the insurance company had been discharged and released from any liability on account of this loss. It had a complete defense to an action brought on the policy to recover for the value of the flour. The situation then was that the defendant had become primarily liable for the amount of the loss, while the insurance company had been released and absolved from liability under its policy. This is conceded by defendant's counsel, but it is urged that the objection and defense were waived, and that the subsequent transactions between the owners of the flour and the insurance company amounted to an election on the part of the latter to make unconditional payment, and that, therefore, defendant is entitled to the benefit of the same by reason of the stipulation in the carriage contracts. We do not consider the transaction between the insurance company and the insured as indicating an intention on the part of the former to waive the condition of the policy, or as showing an election on its part to make unconditional payment. Such intent or election was expressly repelled by its acts. It absolutely refused to treat with the owners of the flour, except conditionally, and in a manner which would prevent an imputation to it of any such intent or election. But it is clear that the insurance company, absolved from payment as it was, and under no legal obligation to pay, had the right to exact such terms with respect to the party primarily liable to the insured as it chose as a condition of payment. Inman v. Railway Co., 129 U. S. 128, 9 Sup. Ct. 249. This is no new proposition of law, and is distinctly recognized in one of the cases relied upon by defendant's counsel. Lancaster Mills v. Merchants' Cotton Press Co., 89 Tenn. 1, 14 S. W. 317. So that, if we concede the transaction as amounting to payment, it was upon terms which

the insurer had a legal right to impose, that it should have the unqualified absolute right to proceed against the party primarily liable to the insured. It follows that defendant, primarily liable, is not in a situation to complain or to object or to demand that it have the benefit of the payment. * * *

Life Insurance.

CONNECTICUT MUTUAL LIFE INS. CO. v. NEW YORK AND NEW HAVEN RAILROAD CO.

Supreme Court of Connecticut, 1856. 25 Conn. 265.

STORRS, J. The defendants, a railroad company, are charged with having negligently occasioned the death of one Dr. Beach, by which event the plaintiffs, a life insurance company, have been compelled to pay to his representatives the amount of an insurance effected upon his life, of which amount a recovery is sought in this action. * * *

We decide that in the absence of any privity of contract between the plaintiffs and defendants, and of any direct obligation of the latter to the former growing out of the contract or relation between the insured and the defendants, the loss of the plaintiffs, although due to the acts of the railroad company, being brought home to the insurers only through the artificial relation of contractors with the party who was the immediate subject of the wrong done by the railroad company, was a remote and indirect consequence of the misconduct of the defendants, and not actionable. * * *

The cases in which insurers have been permitted to recover against the authors of their losses are not in contravention of these principles. They have recovered, not by color of their own legal right, but under a general doctrine of equity jurisprudence, commonly known as the doctrine of subrogation, applicable to all cases wherein a party who has indemnified another in pursuance of his obligation so to do succeeds to, and is entitled to a cession of, all the means of redress held by the party indemnified against the party who has occasioned the loss. In some instances the doctrine has been carried so far that an insurer has been permitted to recover from the insured such compensation as the

latter has subsequently obtained from the wrongdoer; as if the money paid by the tort-feasor, under such circumstances, was really paid for the use of the insurer. By virtue of this doctrine, there is no doubt of the right of an insurer, who has paid a loss, to use the name of the insured, in order to obtain redress from the author of the wrong; a right to be exercised for the benefit of the party equitably entitled to its benefits, not to be enforced by its possessor in his own name, but by him as the successor to the remedies of the person whom he has indemnified. Having no independent claim on the wrongdoer, he might be successfully met by the superior equities of the wrongdoer, such for instance as a payment to the party directly injured, without notice of the insurer's claim to be subrogated. Nothing can be plainer than that an indirect liability of this kind is an argument rather against a claim of a direct responsibility of the wrongdoer than a suggestion in its favor. The views taken by courts in recognizing the insurer's right of subrogation tend to sustain the principle which we now maintain.

CHAPTER V.

WAIVER AND ESTOPPEL.

Waiver and Estoppel Distinguished—Implied Waivers.

ORIENT INS. CO. v. McKNIGHT.

Supreme Court of Illinois, 1902. 197 Ill. 190, 64 N. E. 339.

CARTER, J. The appellee obtained a judgment against appellant on its policy insuring certain cribs of corn belonging to appellee from loss by fire. The judgment was affirmed by the appellate court, and the appellant company took this its further appeal.

Appellee had been engaged in shelling the corn with a steam cornsheller, and late at night, on or about September 14, 1899, the cribs took fire, and they and the corn in them were destroyed. The policy contained the following provisions: (1) That the entire policy should be void if the interest of the insured in the property be not truly stated therein; (2) that the entire policy should be void if the hazard be increased by any means within the control or knowledge of the insured; (3) that the entire policy should be void if the interest of the insured be other than unconditional and sole ownership; and (4) that "this policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed herein or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The principal defense was that in shelling his corn with a steam sheller set near the cribs the hazard was increased by the insured, and that the policy thereby became void under the second condition of the policy above set out. While not conclusive, there was evidence to prove that the fire originated from the engine, and that the hazard was increased by shelling the corn in the manner adopted. But these were questions of fact which have been finally disposed of by the judgment of the appellate court, and, although appellant asked the court to instruct the jury to find for the defendant, we would not be authorized to say, as a matter of law, under all the evidence, that the hazard was increased and that the instruction should have been given. But, even if the hazard was increased in violation of said second provision of the policy, there was sufficient evidence upon which the jury were authorized to find that appellant had waived this provision. The plaintiff testified that he notified the defendant's agent when about to begin the work of shelling and shipping the corn that he intended to shell it with a steam sheller, and that the agent said it would be all right. Such waiver was not written upon or attached to the policy, in compliance with its fourth provision, but we have held that such a provision may also be waived. Insurance Co. v. Hart, 149 Ill. 513, 36 N. E. 990; Insurance Co. v. Dowdall, 159 Ill. 179, 42 N. E. 606; Insurance Co. v. Caldwell, 187 Ill. 73, 58 N. E. 314. Such provisions, being for the benefit of the company, may be waived by it, and when having knowledge of the fact it should not be permitted to retain the money of the insured and treat the policy as in full force until a loss occurs, and then for the first time seek to avoid the policy. Counsel for appellant have referred to cases holding otherwise, including Northern Assur. Co. v. Grand View Building Ass'n (decided by the supreme court of the United States at its October term, 1901, by a divided court), 22 Sup. Ct. 133; but we have adopted a different rule in this state, and it must be applied in this case.

Criticisms are made upon the rulings of the court in reference to the evidence and in instructing the jury, but in the main they relate to the same question above mentioned and need not be here commented on.

After consideration of the arguments and of all the questions raised we find no sufficient cause to reverse the judgment. It will, therefore, be affirmed.

Waiver at the Time the Policy is Delivered.

GRAY v. GERMANIA FIRE INS. CO.

Court of Appeals of New York, 1898. 155 N. Y. 180, 49 N. E. 675.

The action was upon a policy of fire insurance for $1,000, issued by the defendant October 1, 1892, insuring the goods of the plaintiffs in their store at Haverstraw, N. Y. It was a New York standard policy, and prohibited other insurance unless the consent of the company was indorsed thereon. It also provided that none of its agents should have power to waive any of its provisions except by a written indorsement on the policy. The defendant's agent applied to the plaintiffs to insure their goods. They informed him of their intention to procure insurance to the amount of $3,000 in three different companies, and permitted him to write a policy for $1,000 in the defendant company. When the policy was delivered the agent, in answer to an inquiry of the plaintiffs, stated that it was correct. They subsequently obtained two other policies upon the property insured, one for $700 and the other for $1,000. The defendant's agent had power to issue policies and to indorse permission for other insurance. But no such indorsement was made upon the policy in suit.

MARTIN, J. The only question we are called upon to determine in this case is whether the knowledge of the defendant's agent that the plaintiffs intended to procure other insurance upon the property covered by the defendant's policy constituted a waiver of the provision therein prohibiting other insurance without the indorsement upon the policy of an agreement to that effect. The courts below have so held. This conclusion was based upon the theory that as the defendant's agent knew that the plaintiffs intended to procure other insurance when the policy in suit was issued, and delivered it with that knowledge, it constituted a waiver of its provision as to other insurance. Manifestly, this theory cannot be sustained. It is well settled in this state that where an insurance company issues a policy, with full knowledge of facts which would render it void in its inception if its provisions were insisted upon, it will be presumed that it by mistake omitted to express the fact in the policy, waived the pro-

vision, or held itself estopped from setting it up, as a contrary inference would impute to it a fraudulent intent to deliver and receive pay for an invalid instrument. Van Schoick v. Insurance Co., 68 New York 434; Whited v. Insurance Co., 76 New York 415; Richmond v. Insurance Co., 79 N. Y. 230; Woodruff v. Insurance Co., 83 N. Y. 133; Short v. Insurance Co., 90 N. Y. 16; Forward v. Insurance Co., 142 N. Y. 382, 37 N. E. 615; Wood v. Insurance Co., 149 N. Y. 382, 44 N. E. 80; Robbins v. Insurance Co., 149 N. Y. 477, 484, 44 N. E. 159.

But it is manifest that that principle has no application to the facts in this case. When the defendant's policy was delivered neither of the other policies had been issued, but were subsequently obtained. Consequently the defendant's policy was valid in its inception. If it became invalid it was by the act of the plaintiffs in subsequently procuring additional insurance, without obtaining an indorsement upon the policy of the defendant's consent. As the defendant issued to the plaintiffs a policy which was valid when delivered, the fact that they informed the defendant's agent of their intention to subsequently procure other insurance was insufficient to justify the courts below in holding that there was a waiver of that condition, or that the defendant was estopped from insisting upon it. Baumgartel v. Insurance Co., 136 N. Y. 547, 32 N. E. 990; Moore v. Insurance Co., 141 N. Y. 219, 36 N. E. 191; McNierney v. Insurance Co., 48 Hun 239. The distinction between the knowledge of an existing fact which renders a policy void when delivered and the omission of the insured to give notice of and procure the required consent to a subsequent act, which, by its conditions, invalidated it, although previously consented to, was clearly pointed out in the authorities cited. The decisions of the courts below are at variance with the principle that written contracts cannot be controlled or varied by oral evidence, and that a written instrument must be regarded as the receptacle of the entire contract between the parties, and merges all previous oral agreements in it. Nor do we think the contention of the respondents, that they were entitled to recover upon a parol contract of insurance made with the agent, can be sustained. There was no proof that the defendant's agent ever agreed to issue a policy different from the one delivered, or that he agreed that other insurance might be procured without the indorsement required. It is manifest that this action was upon

the policy issued by the defendant, and was not based upon any other agreement between the plaintiffs and the agent of the defendant.

VAN SCHOICK v. NIAGARA FIRE INS. CO.

New York Court of Appeals, 1877. 68 N. Y. 434.

FOLGER, J. This was an action upon a policy of fire insurance. It contained this condition: "Any interest in property insured not absolute, or that is less than a perfect title, or if a building is insured that is on leased ground, the same must be specifically represented to the company, and expressed in this policy in writing, otherwise the insurance shall be void." The fact is that part of the property described in the policy, as subject of the insurance, was a building on leased ground. That fact was not expressed in writing in the policy. The defendant claims that thereby the insurance was void, and puts itself thereon as a defense to the action. It is to be observed of this condition that it is not one of those which are subsequent to the formation of the contract, a breach of which may occur after there has been a valid contract made and entered into, and continued in existence for a part of its prescribed term. It is a condition precedent, lying at the threshold of the making of the contract, and which, if not then performed or not then obviated, prevents the formation of an enforcible contract. It is obvious that, this building being on leased ground, the very moment that the policy passed from the defendant to the plaintiff the insurance on it was void, if the condition holds. They were concurrent acts, the delivery of the contract, and a breach of this condition; so that at the same instant that the defendant said we insure this building, at the same instant the condition was broken and the insurance was void. So that, if nothing is shown to break the rigid effect of this condition, there never was any insurance by this defendant upon that building. We would scarce expect two parties to go through so senseless and trifling an act, if the facts were known to each at the time; but would rather conclude that they had by words or act agreed that the condition should not be considered as binding. "If these defendants were an entity, and could have stood near to that building when the oral negotiation

for insurance was made and completed, and have seen" and known that it was upon leased ground, "could it fairly be contended that they would have offered to the plaintiff, or that he would knowingly have received, as the correctly written evidence of the contract, this policy, with the condition in question contained in it as an operative and binding clause? We cannot suppose that either plaintiff or defendant would do the utterly absurd thing of making, with deliberation and knowledge, a contract that was void from inception, and was in contradiction of the facts and statements of the negotiation." It is plain that the plaintiff and the agent meant to contract and did contract for the insurance of that building as a building on leased land. Cone v. Niagara Fire Ins. Co., 60 N. Y. 619. Hence we are not surprised that the plaintiff claims that the fact that the building was on leased ground was made known to the defendant when the policy was applied for; and that the policy was delivered and the premium accepted by them without insisting upon the fact and the condition. He makes that action of the company, with that knowledge, his reply to their defense based on that condition and its breach. * * *

It is difficult to make all cases upon this subject harmonize; but, by the force of authority, we are constrained to hold that such a condition as this may be waived by the insurer, by express words to that effect, or by acts done under such circumstances as would otherwise impute a fraudulent purpose, and as will estop him from setting up the condition against the insured. * * *

UNION MUT. INS. CO. v. WILKINSON.

United States Supreme Court, 1871. 13 Wallace 222.

[In an action on a life insurance policy, the insurance company, among other defenses, alleged that there was misrepresentation in the answers to the questions in the application. The age of the insured's mother at the time of her death was stated to be 40, and fever was stated to be the cause of death. The Supreme Court affirmed the ruling of the trial court, admitting parol evidence to show that the agent, who filled in the application, was told that the parties knew nothing about the facts alleged to have been falsely represented.]

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MILLER, J., delivered the opinion of the court. * * * The defendant excepted to the introduction of the oral testimony regarding the action of the agent, and to the instructions of the court on that subject; and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him. * * *

The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from

using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

NORTHERN ASSURANCE CO. v. GRAND VIEW BLDG. ASSOCIATION.

Supreme Court of the United States, 1902. 183 U. S. 308.

In an action[1] against an insurance company on a fire insurance policy, the plaintiff offered the original policy in evidence, containing, among other things, the following provisions:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements and conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or remission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The defendant, to maintain the issues on its part, called as a witness A. D. Borgelt, who testified that he was a member of the firm of Borgelt & Beasley, insurance agents at Lincoln, Nebraska, which firm wrote the policy in the Northern Assurance Company on the Grand View Building Association; that at the time he wrote the policy he had no notice or knowledge that there was other insurance upon the property covered by the policy in

[1] With but slight verbal changes, this statement of facts is taken from the opinion of the court.

suit, and the first time he knew of any other insurance was after the fire; that while Walsh might have mentioned that there was an existing policy, he, the witness, had no recollection of having known anything about the other insurance until after the fire. He further testified that on August 4, 1898, the premium paid for the policy in suit was tendered to the plaintiff company, which declined to take it. The defendant thereupon moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and defendant excepted.

The jury, under the instructions of the court, found that the defendant company issued to the plaintiff company the policy described in the plaintiff's petition; that the property covered by said policy of insurance was burned on or about June 1, 1898; that the plaintiff, on or about July 26, 1898, furnished the defendant with proofs of the loss of said property by fire; that the policy contained the provision hereinbefore mentioned, providing that the policy should be void if the insured had or should thereafter make or procure any other contract of insurance on the property covered by the policy in suit, and that the policy was made subject to such condition, and that no officer, agent or other representative of the company should have power to waive any provision or condition of the policy except such as by the terms of the policy had been indorsed thereon or added thereto, and that no officer, agent or representative of the company should have power or be deemed or held to have waived such provision or condition unless such waiver was written upon or attached to the policy, and that no privilege or provision affecting the insurance under the policy should exist or be claimed by the insured, unless so written or attached; that there was at the time of the issuance of the policy in suit other insurance upon the insured property in the sum of $1,500, in the Firemen's Fund Insurance Company; that Borgelt was recording agent of the Northern Assurance Company, at Lincoln, Nebraska, with authority from the defendant company to countersign and issue its policies and accept fire insurance risks in its behalf, and to collect and receive premiums therefor, and that he had issued the policy sued on as such agent; that Borgelt knew, when the policy in the defendant company was issued and delivered to the plaintiff company, that there was then $1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the insured property, issued

prior to the date of the policy of the defendant company, and that such knowledge was communicated to said Borgelt by and on behalf of the assured; that the actual cash value of the property covered by the policy in suit and destroyed by fire June 1, 1898, was $4,140; that no consent to concurrent insurance of $1,500 was indorsed on the policy in suit; and that, on August 4, 1898, the amount of the premium paid for the policy was tendered to and refused by the plaintiff.

Thereafter motions were respectively made by the plaintiff and defendant for judgment upon the findings and special verdict of the jury, and on January 14, 1899, the motion of the defendant was overruled, and exception was taken by the defendant, and the motion of the plaintiff was sustained, and judgment was entered in favor of the plaintiff and exception was taken by the defendant. A writ of error was prayed for by the defendant and allowed, and the cause was taken to the United States circuit court of appeals for the eighth circuit, where the judgment of the circuit court was affirmed, and the cause was then brought to this court by a writ of certiorari.

SHIRAS, J., delivered the opinion of the court: * * * What, then, was the case of Union Mut. L. Ins. Co. v. Wilkinson?[1] That was a case where the agent of a life insurance company had inserted in the application a representation of the age of the mother of the assured at the time of her death, which was untrue, but which the agent himself obtained from a third person and inserted without the assent of the assured. It was held that this untrue statement contained in the application did not invalidate the policy; that permitting verbal testimony to show how this untrue statement found its way into the application did not contradict the written contract sued on, but proceeded on the ground that this statement was not that of the assured. The trial court said to the jury that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries he made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defense to the action to show that the agent was mistaken. The case, as reported,

[1] 13 Wall. 222 (U. S.).

does not disclose that the plaintiff's testimony as to the way in which the untrue statement was put in the application was contradicted or denied by the company. It may therefore be presumed that the plaintiff's case, in that respect, was made out by undisputed evidence. And it would seem, such being the state of facts, that this court had reason to hold that the untrue statement was not made by the assured, and that it would operate as a fraud upon the plaintiff if he were not permitted to show this fact, which was not a fact or statement contained in the policy sued on, but an extrinsic fact or statement contained in the application. The defense made upon that statement was in legal effect a denial of the execution of the statement—a defense that can always be sustained by parol evidence.

However this may have been, we are unwilling to have the case regarded as one overthrowing a general rule of evidence. Some of the remarks contained in the opinion might seem to bear that interpretation, but not necessarily so. * * *

What, then, are the principles sustained by the authorities, and applicable to the case in hand?

They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power

in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent.

In the light of these principles, let us examine the contract that was made between the parties to the controversy before us. The contract was in writing, and in clear and unambiguous terms; that contract provided that "this entire policy, unless otherwise provided by agreement indorsed hereon or added thereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," and that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement indorsed hereon or added hereto, and, as to such provisions or conditions, no officer, agent or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Such being the contract, and the property insured having been destroyed by fire on June 1, 1898, and the insurance company having denied liability because informed that other insurance was held by the insured on the same property, without the knowledge or consent of the company, this action was brought.

It is not pretended, as we understand the plaintiff's position, that by any language or declaration of the agent, at the time the policy was delivered and the premium paid, he claimed to have power to waive any provision or condition of the policy, nor that the plaintiff was induced to accept the policy by any promise of the agent to procure the assent of the company to

permit the outstanding insurance and to waive the condition. The plaintiff's case stands solely on the proposition that because it is alleged, and the jury have found, that the agent had notice or knowledge of the existence of insurance existing in another company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. In other words, the contention is that an agent with no authority to dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract, those limitations being according to all the authorities presumably known to the insured. It was not shown that the company, when it received the premium, knew of the outstanding insurance, nor that, when made aware of such insurance, it elected to ratify the act of its agent in accepting the premium. On the contrary, all the record discloses is that the jury found that the agent knew, when the policy in the defendant company was issued and delivered to the plaintiff, that there was then subsisting fire insurance to the amount of $1,500 in another fire insurance company, and that such knowledge had been communicated to the agent by or on behalf of the assured.

* * * * * * * * *

Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony. Increased importance should be given to the rules involved in this discussion by the fact that, in latter times and in most, if not all, of the states, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy.

The CHIEF JUSTICE, JUSTICE HARLAN and JUSTICE PECKHAM dissent.

Incontestable Policies.

PATTERSON v. NATURAL PREMIUM MUT. LIFE INS. CO.

Supreme Court of Wisconsin, 1898. 100 Wis. 118.

This is an action to recover upon an insurance policy issued by the appellant July 20, 1895, upon the life of Alexander W. Patterson, and originally payable to the adminstrators, executors or assigns of the insured. On the 4th of October, 1895, the policy was assigned, with the consent of the company, to the plaintiffs, who are the children of the insured. Alexander W. Patterson was 49 years of age at the time of the issuance of the policy, and was then married to his second wife, by whom he had no children, the plaintiffs being his children by a previous marriage. The first year's premium was paid upon the policy, and the insured died by his own hand February 25, 1896. * * * The policy itself contained the following provisions, among others: "This policy is absolutely incontestable from the date of its delivery and acceptance, except for nonpayment of premiums or misstatement of age; and the latter may be corrected or adjusted if the age of entry was within the limit of ages insured by this company. * * * Engaging in military or naval service in time of war or insurrection, without the written permission of the company, or death in consequence of, or in, violation of law by said insured, are risks not assumed by this company." There was no special provision as to death by suicide.

WINSLOW, J. (after stating the facts). * * * In determining what rule should be adopted by this court in the present case, there are numerous considerations which deserve attention. It must be borne in mind that the suicide clause has become so universal in policies that its absence at once attracts attention. It can hardly be otherwise than that the agent soliciting insurance under such a policy as this would at once call attention to its apparent liberality, in that there was no suicide clause, and, further, that there was in addition an "absolutely incontestable" clause; and the average layman (not to say lawyer), in looking it over, would conclude that it was in fact a very favorable policy to the insured. These provisions are all carefully framed by the insurance company, and expressly framed to induce people to

insure; and the principle is familiar and just that, when the policy is capable of two meanings, that which is most favorable to the insured is always to be adopted. Utter v. Insurance Co., 65 Mich. 545, 32 N. W. 812. In at least one state (Missouri) there exists a statute which prohibits the defense of suicide, except when it was contemplated at the time of effecting the insurance, and makes void any contrary stipulation in the policy. Rev. St. Mo. 1889, § 5855. This statute has been enforced by the courts of Missouri, and by the circuit court of appeals of the United States, without apparent question as to its validity on the ground of public policy. Keller v. Insurance Co., 58 Mo. App. 557; Indemnity Co. v. Berry, 1 C. C. A. 561, 50 Fed. 511. Bearing these things in mind, and while conceding the strength of the arguments upon public policy on which the Ritter Case[1] is based, we still think, in view of the prior decisions above cited to the contrary of the rule there laid down, and the general apparent acquiescence in those decisions by the courts and by the people, that we ought to hold, in accordance with those decisions, that, in a case where third persons are beneficiaries, intentional suicide of the insured while sane does not avoid the policy, in the absence of any provision in the policy to that effect. Whether the rule would apply to a case where the personal representatives of the insured were bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us. In so holding, it becomes unnecessary to consider the effect of the incontestable clause upon this branch of the case. * * * But it is further claimed by the defendant that the evidence tended to show a fraudulent scheme on the part of Patterson, when he took out his policy, to obtain insurance on his life for the purpose of thereafter committing suicide, and defrauding the company for the benefit of his children. Doubtless this would be a good defense, if shown, unless it be cut off by the "incontestable clause." It should be a defense not based on the suicide alone, but on the whole fraud, of which the act of suicide was only the ultimate step. But the difficulty is that we have been unable to find any evidence which would justify the submission of that question to the jury. It is said that he falsely represented his state of health in his application, and concealed some of the grounds upon which he had previously made appli-

[1] 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

cation for a pension. There does not seem to be much merit in the claim. He submitted himself for examination to the company's medical examiner, who reported that he had dyspepsia, and that he was only a second-class risk. The company had full notice that he was not in first-class health, because the insured himself stated in his application that he had dyspepsia, and had had malaria, and had applied for a pension on the ground of indigestion brought on by exposure in the army. Besides, the incontestable clause would seem to effectually bar this defense. If this clause be not altogether a glittering generality, put in for no purpose except to induce men to insure, it would seem that it must cover such misstatements or omissions as are here alleged. Such clauses have been upheld by various courts. Wright v. Association (N. Y. App.) 23 N. E. 186; Simpson v. Insurance Co. (N. C.) 20 S. E. 517; Goodwin v. Society (Iowa) 66 N. W. 157; Kline v. Association, 111 Ind. 462, 11 N. E. 620. We see no reason why an insurance company may not take the risk of ascertaining for itself the condition of health of the insured.

Judgment for plaintiff affirmed.

CHAPTER VI.

ASSIGNEES.

Property Insurance.

CONTINENTAL INS. CO. v. MUNNS.

Supreme Court of Indiana, 1889. 120 Ind. 30, 22 N. E. 78.

MITCHELL, J. This is an appeal from a judgment rendered by the Montgomery circuit court, in favor of William Munns against the Continental Insurance Company. The questions for decision arise upon the following facts: On January 17, 1883, the insurance company above named delivered to John Bittle a policy of insurance by which it insured his dwelling-house and its contents, consisting of household furniture, etc., his barn, sheds and granary and their contents, severally, consisting of farming utensils, wagons, carriages, grain, horses, etc., for a period of five years, for a gross premium of $37. At the time the policy was issued, Bittle owned the farm upon which the several buildings insured were situate, and the personal property covered by the policy was in the buildings therein described, the insurance being apportioned in specified sums upon the several buildings and the property therein situate. The policy contained a stipulation of the following purport: "If the applicant shall mortgage or otherwise incumber the property hereby insured, without notice to and consent of the company indorsed hereon, this policy shall become null and void." On the 27th day of June, 1885, Bittle, without notice to the company, and without its knowledge or consent, mortgaged the farm upon which the house, barn, and other buildings insured were situate, to the Provident Life & Trust Company of Philadelphia, to secure a loan of $5,000. In the month of September following, he sold and conveyed the land, with the buildings thereon, to William Munns for the consideration of $12,000, and in a few days thereafter, without any new consideration, transferred the policy of insurance to the purchaser. The latter soon afterwards presented the policy to the company's general superintendent, who

indorsed its consent thereon that the policy might be assigned to the purchaser, subject to all the terms and conditions mentioned or referred to therein. The company had no notice or knowledge of the existence of the mortgage at the time it gave its consent to the transfer of the policy. On July 27, 1886, the barn, shed and granary and their contents were consumed by fire, entailing a loss amounting to $1,700. After the destruction of the property the company learned of the mortgage executed by Bittle, when it refused payment of the loss, on the ground that placing the incumbrance above mentioned on the property was a violation of the condition of the policy which rendered it null and void.

Whether the judgment shall be affirmed or reversed depends upon whether or not the company can avail itself of the default of Bittle in an action on the policy by the plaintiff. It must be assumed as a matter of course that the latter, when he purchased the farm and took an assignment of the insurance policy, had knowledge of the mortgage on the land and of the condition relating to incumbrances in the policy. Imputing to him knowledge of these facts, the question remains, did he take the property strictly as assignee, subject to all the infirmities, defenses, or any forfeiture which the laches or default of the assignor may have imposed upon it, or did the assignment, with the consent of the company, constitute the policy in effect a new and original contract between the latter and the assignee, unaffected by any previous forfeiture that may have occurred? If the transfer of the policy simply substituted the assignee to the rights which the assignor then had in the contract, it may well be said that if the latter had no rights by reason of the forfeiture, which occurred prior to the assignment, the next transfer conferred no new rights on the assignee. If, on the other hand, the assignment of the policy, with the assent of the company, constitutes a new, original and independent contract between the assignee and the insurer, then it is quite clear that no act of forfeiture committed by the assignor before the sale, assignment and consent is available against the policy in the hands of the purchaser newly insured. A contract of insurance is purely a personal engagement, by which the insurer, for a consideration paid, agrees to indemnify the person insured against loss arising from damage to his property. The contract appertains to the person with whom it

is made, and does not run with the property insured. Nordyke & Marmon Co. v. Gery, 112 Ind. 535, 13 N. E. Rep. 683; Cummings v. Insurance Co., 55 N. H. 457. It is abundantly settled that upon a sale and transfer of property covered by a policy of insurance, and an assignment of the policy to the purchaser, duly assented to by the company, a new and original contract of insurance arises between the insurance company and the assignee, which the latter may enforce without regard to what may have occurred prior to the assignment. The policy, it is said in such a case, expires with the transfer of the estate, so far as it relates to the original holder; but the assignment and assent of the company thereto constitute an independent contract with the purchaser and assignee, the same in effect as if the policy had been reissued to him upon the terms and conditions therein expressed. Wilson v. Hill, 3 Metc. 66; Fogg v. Insurance Co., 10 Cush. 337; Flanagan v. Insurance Co., 25 N. J. Law, 506; Cummings v. Insurance Co., 55 N. H. 457; Steen v. Insurance Co., 89 N. Y. 315; Shearman v. Insurance Co., 46 N. Y. 527; Hooper v. Insurance Co., 17 N. Y. 424; Ellis v. Insurance Co., 64 Iowa 507, 20 N. W. Rep. 782; Wood, Ins. §§ 110, 366.

Where an estate is sold and the policy transferred to the purchaser, and, upon notice to the insurer, he assents to it, a new and original contract of indemnity arises to the assignee, which he may enforce in his own name. The policy in such case expires with the transfer of the title to the estate, but the assent of the insurer to the assignment of the policy constitutes a new contract. Pratt v. Insurance Co., 64 Barb. 589; Fland. Ins. 412, 484; Foster v. Insurance Co., 2 Gray 219.

Aside from the prohibitory clause, policies of insurance, prior to any loss, are not in their nature assignable from one person to another without the express consent of the insurance company issuing them. They are therefore subject to the common-law rule, the effect of which is that where the assignee of a contract gives notice of the assignment to the other party to the instrument, and the latter assents to it, the transaction constitutes a new engagement between one of the parties to the contract and the assignee of the other, the terms of which are regulated and fixed by the original contract. Fogg v. Insurance Co., supra; Wilson v. Hill, supra; Hooper v. Insurance Co., supra; Fland. Ins. 484.

In order that a policy of insurance may be effectual, the insured must have an interest in the property covered by the contract of insurance, not only when the contract is entered into, but when the loss occurs. If the interest in the property and the interest in the policy become separated, the operation of the policy becomes suspended; and if a loss occurs while the policy is thus suspended, no recovery can be had. An assignment of an insurance policy, without a transfer of the property insured, would be an idle ceremony so far as transferring to the assignee any beneficial interest in the contract. On the other hand, the transfer of the property insured suspends the operation of the policy, which becomes inoperative for want of a subject-matter to act upon, until, by the assignment and assent of the company, a new contract of insurance, embodying the same terms and conditions as the old, arises between the latter and the purchaser. The contract of insurance thus consummated arises directly between the purchaser and the insurance company, to all intents and purposes the same as if a new policy had been issued, embracing the terms of the old. In such a case, no defense predicated on supposed violations of the conditions of the policy by the assignor will be available against the assignee. Until the latter himself does some act or permits a condition of things to exist in violation of the terms of the policy, he is not in default. Ellis v. Insurance Co., 68 Iowa 578, 27 N. W. Rep. 762, and Insurance Co. v. Garland, 108 Ill. 220, are not opposed to the conclusions above stated. The case first cited involved a policy which contained a provision that "if the title of the property is * * * incumbered, * * * this policy shall be void." At the time the policy was assigned there was a mortgage on the property, which remained upon it until after the loss. This condition, as the court well says, pertained to the character of the risk as it then was or should thereafter be, and when the assignee became a party to the condition, he virtually agreed that if there was then or should thereafter be an incumbrance on the property, he should not, in case of loss, be entitled to recover. The contract provided against subsisting incumbrances as fully as it did against those which might be made thereafter, and the gist of the defense which the court sustained was that the incumbrance was allowed to remain. The court fully recognizes the doctrine of its former decisions which hold that an assignment of policy, with

the assent of the insurance company, creates a new contract, and that the assignee is not affected by the acts of the assignor. The other case relied upon was predicated upon a policy which contained a stipulation to the effect that if "the assured shall allow the buildings herein insured to become vacant or unoccupied and so remain, * * * this policy shall become void." It was properly held that this provision was imported into the new contract, and became a present agreement with the assignee, and that as he permitted the premises to remain unoccupied the company had the right to avoid the policy because he had violated his agreement. The distinction between the cases relied on and the present case is obvious. In those cases the defenses were not predicated upon acts or defaults of the vendor, but upon violations of the terms of the policy by the vendee himself. The policy involved in the present case contained no provision against subsisting incumbrances. Future incumbrances alone were referred to, and the established rule is that conditions which create forfeitures will not be extended by construction. Insurance Co. v. Hazelett, 105 Ind. 212, 4 N. E. Rep. 582; Symonds v. Insurance Co., 23 Minn. 491.

There is no pretence that the assignee made any misrepresentation concerning the condition of the risk at the time the company gave its assent to the assignment. The rule applicable is that a failure or neglect on the part of the insured to make known facts which the insurer may regard as material to the risk is not a breach of a condition in the policy, avoiding it in case of any omission to make known every fact material thereto, because the insured has a right to suppose that the insurer will make proper inquiries concerning all facts except such as are supposed to be known or are regarded as immaterial. Short v. Insurance Co., 90 N. Y. 10; Burritt v. Insurance Co., 5 Hill 188; Clark v. Insurance Co., 8 How. 235. In the case last cited the court said: "As to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them, and if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak."

An applicant for insurance is not bound, unless inquired of, to disclose whether or not the property insured is incumbered.

As the public records usually give information in reference to such matters, he may assume that the insurer knew of any existing incumbrances or deemed it immaterial whether or not the property was incumbered.

Life Insurance.

WARNOCK v. DAVIS.

Supreme Court of the United States, 1881. 104 U. S. 775.

FIELD, J., after stating the facts, delivered the opinion of the court.

* * * The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.

STEINBACK v. DIEPENBROCK.

Court of Appeals of New York, 1899. 158 N. Y. 24, 52 N. E. 662.

PARKER, C. J.[1] In December, 1887, Alois Diepenbrock took out a policy of insurance on his life in the Equitable Life Assurance Society. He paid the premiums regularly down to December, 1892, a period of about five years, at which time the surrender value of the policy was about $485. He was pressed for money, and finally sold the policy to the defendant Erdtmann for $600, or something like $115 more than he would have received by the surrender of the policy to the company. He had paid a much larger sum in premiums—something over $2,000—and there seems to be no good reason why a person owning such

[1] Paragraphs of the opinion have been rearranged.

a policy, and obliged to sell it, should not be permitted to get back as much as possible of the money that he has paid out for insurance. His condition of health may have changed very materially, of which fact the company can take no advantage; for in its contract it made allowance for that possibility. There is no good reason for saying that an insured person should not have the right, whenever his necessities press him, because of a failing condition of health that assures a speedy death, to realize on his policy and obtain for it something like a fair price, which may, perhaps, be almost equal to its face value. * * *

The counsel for the appellant, in his argument, insisted with great earnestness and force that the position several times asserted by this court in support of the legality of the assignment of a policy of insurance to a person having no insurable interest in the life of the insured is a mistaken one, and in conflict with the decisions of the United States supreme court and the court of last resort in many of the states. Warnock v. Davis, 104 U. S. 775; Insurance Co. v. Hazzard, 41 Ind. 116; Insurance Co. v. Sturges, 18 Kan. 93; Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626; Basye v. Adams, 81 Ky. 368; and Helmetag's Adm'r v. Miller, 76 Ala. 183,—furnish support for his assertion as to the rule in the United States supreme court and in some of the other states. Supported by these authorities, the counsel challenged the correctness of the rule that concededly has been long acquiesced in in this state by the courts and the profession. Indeed, Mr. Justice Field, in his opinion in Warnock v. Davis, supra, stated the rule in this state to be that a valid assignment of a policy of insurance could be made to a person without interest in the insured. But the appellant contends that, while this may be the rule here, the decisions in other jurisdictions demonstrate that our position is wrong as a matter of sound public policy, and, therefore, the true rule should be laid down, notwithstanding that expressions inducing the belief that the above rule obtained may have been made by our courts. It is urged that this task will not be a difficult one, for the reason, as the appellant contends, that there have been no cases in this state where the question was necessarily up for decision, and, therefore, all that has been said upon that subject by this court is mere dictum.

The result of our further examination persuades us that what has been understood to be the rule in this state is not only in

line with the authorities in most jurisdictions upon that subject, but is sound as a matter of public policy. It was formerly the rule in England that, while a policy of insurance could not be assigned at law, it could in equity. By the act of 1867 (30-31 Vict. c. 144) a policy of life insurance was made assignable at law, and in some of the decisions it was said by the court that the object of the statute was to enable the assignee to sue in his own name; but it did not in any other way improve the position of the assignee, who could before that secure the money in equity. British Equitable Ins. Co. v. Great Western Ry. Co., 38 Law J. Ch. 132; In re Turcan, 40 Ch. Div. 5. The rule asserted by this court has also been held to be the law in many of our sister states in a number of cases, where the question has been raised either in actions brought by personal representatives of the assignor to recover the money received by the assignee on a policy or in suits brought by the company issuing the policy for the purpose of determining whether the personal representatives or the assignee were entitled to the proceeds, all claimants being made parties defendant. Insurance Co. v. Allen, 138 Mass. 24; Eckel v. Renner, 41 Ohio St. 232; Martin v. Stubbings, 126 Ill. 387, 403, 18 N. E. 657; Fitzgerald v. Insurance Co., 56 Conn. 116, 13 Atl. 673, and 17 Atl. 411; Clark v. Allen, 11 R. I. 439; Murphy v. Red, 64 Miss. 614, 1 South. 761; Rittler v. Smith, 70 Md. 261, 16 Atl. 890. These authorities are, it seems to us, well grounded in principle. They recognize not only the existence of, but the necessity for, the rule that forbids any insurance upon the life of a person in which the person for whose benefit the insurance is made has no interest. Such a policy constitutes what is termed a "wager policy," or a mere speculative contract upon the life of the insured, with a direct interest in favor of its early termination. It is, in terms, forbidden by statute in England (14 Geo. III. c. 48) and in many other jurisdictions, including this state (Laws 1892, c. 690, § 55); and this court held in Ruse v. Insurance Co., 23 N. Y. 516, that such insurance is void at common law, and that the English statute, in so far as it prohibits such insurance, is merely a declaratory act.

But the question we are considering presupposes a valid contract of insurance, the policy being issued either for the benefit of the assured personally, or for the benefit of some one having an insurable interest in the assured at the time of the taking out

of the policy. Such a policy constitutes a contract to pay a certain amount of money to the payee on the death of the assured. It is a chose in action, with all the ordinary incidents belonging thereto, and as such may be assigned, either as collateral or absolutely, as the payee may elect. While an insurable interest in the payee is necessary, in the first instance, to the creation of a valid contract, it is not necessary that such interest should continue. The case of a wife divorced from her husband will serve as an illustration. The policy taken out for her benefit during the existence of the marriage relation is not affected by a subsequent severance of that relation through a decree of a court of competent jurisdiction, by which she ceases to have an insurable interest in his life. Insurance Co. v. Schaefer, 94 U. S. 457. The materiality of the value of the interest has relation to the question whether the policy is taken out in good faith, and not as a gambling transaction. If it be taken out in good faith, then a sound public policy would seem to require that the payee should be permitted to treat it as he may any other chose in action, and go to the best market he can find, either to sell it or borrow money on it. It would substantially confine him to such terms as the company issuing the policy should choose to make with him, if he should be limited in his choice of a purchaser to the party having an interest in the continuance of the life of the assured.

On the other hand, it is said that, if the payee of a policy be allowed to assign it, a safe and convenient method is provided by which a wagering contract can be safely made. The insured, instead of taking out a policy payable to a person having no insurable interest in his life, can take it out to himself, and at once assign it to such person. But such an attempt would not prove successful, for a policy issued and assigned, under such circumstances, would be none the less a wagering policy because of the form of it. The intention of the parties procuring the policy would determine its character, which the courts would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, as forming part of one transaction. Cammack v. Lewis, 15 Wall. 643, and Warnock v. Davis, 104 U. S. 775, were cases where the policies were taken out in order that

they might be assigned to the assignees, through their procurement, under circumstances that might well be held to be in evasion of the law prohibiting gaming policies. In Warnock's Case the agreement touching the procurement of the policy and the use to be made of it, including the promise to assign it, was in writing, and executed the very day the policy was applied for, and the day following the assured executed an assignment of the policy, which had in the meantime been issued in pursuance of such an agreement. The insurance company paid over the money to the assignees, and the court held that the personal representatives of the assured were entitled to receive from the assignees all the money, except the sums advanced by them under the agreement, plus the sum paid by them to the widow. In the opinion it is said that the assignment of the policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. That remark was clearly true as applied to the facts of that case, for the policy was taken out in pursuance of an agreement to assign it. It was, therefore, in fact, a policy taken out for the benefit of parties having no insurable interest, although in form issued to the assured, and by him assigned to such parties. In such case the court will always declare the fact to be as it is, without regard to the effort of the parties to hide the truth and cheat the law. But the language employed by the court, and evidently advisedly, is broad enough to cover all assignments of policies to parties not having an insurable interest, including as well those taken out in good faith, and kept up as long as the financial condition of the insured permits, as those deliberately taken out for the purpose of speculation upon a life that the intended beneficiary, whether as payee in the policy or by assignment, has no interest in prolonging. The point of actual separation between the cases asserting the assignability and those asserting the nonassignability of policies of insurance to persons not interested in the continuance of the life of the assured seems to be that those asserting nonassignability proceed on the assumption that the question is one of law, and that, if a policy is not assignable in one case, it cannot be in any case; while in the other line of cases the underlying principle is that all valid contracts are assignable, but that contracts are not necessarily valid and free from the

taint of gambling because upon their face they appear to be regularly and properly issued. In order to ascertain the truth, all the facts and circumstances may be proved, and if it then appears that the parties intended by the contract to enable a third and uninterested party to speculate upon the life of another, the court will declare such contract invalid, not because of the assignment, but in spite of it. * * *

The judgment should be affirmed, with costs.

All concur, except Martin, J., absent.

Judgment affirmed.

CHAPTER VII.

BENEFICIARIES.

Property Insurance—Owners of Limited Interests.

HARRISON v. PEPPER.

Supreme Court of Massachusetts, 1896. 166 Mass. 288, 44 N. E. 222.

MORTON, J. The defendant, as life tenant, had an insurable interest in the property; and although it is alleged in the bill that she renewed the insurance on the building in her own name "as an entirety of estate, without qualification, * * * for the sum of twelve hundred dollars," and that that sum was paid to her as the full value of the dwelling house, without any deduction by reason of the plaintiff's ownership in fee, it is not alleged that the sum so paid exceeded the value of the plaintiff's interest or what the value of the plaintiff's interest was. If the amount received by the defendant did not exceed the value of her interest, then it is clear that the plaintiff has no right in equity to any portion of it. Reitenbach v. Johnson, 129 Mass. 316; Martineau v. Kitching, L. R. 7 Q. B. 436; Stilwell v. Staples, 19 N. Y. 401. But if we assume that the sum paid represents the total value of the dwelling house, and exceeds the value of the defendant's interest, and that the bill finally alleges this, still we do not think that the plaintiff is entitled to recover. A tenant for life is liable for any unauthorized act which tends to the injury of the inheritance; in other words, for voluntary waste. How far and under what circumstances he is liable for what is termed "permissive waste" is not altogether clear, and we need not consider. In re Cartwright (Avis v. Newman) 41 Ch. Div. 532; Leake, Land, 92; Pol. Torts, 285, 286; Tayl. Landl. & Ten. (7th Ed.) § 688; Kerr, Inj. 252. We have been referred to no case in which it has been decided that the neglect of the life tenant to insure is to be regarded as in the nature of voluntary or permissive

waste, though it has been held that the failure to pay taxes is (Stetson v. Day, 51 Me. 434); but that, manifestly, stands upon different ground. It is plain that the plaintiff is not entitled to recover unless she has some claim upon the funds in the hands of the defendant.

In the absence of anything that requires it in the instrument creating the estate, or of any agreement to that effect on the part of the life tenant, we think that the life tenant is not bound to keep the premises insured for the benefit of the remainderman. Each can insure his own interest, but, in the absence of any stipulation or agreement, neither has any claim upon the proceeds of the other's policy, any more than in the case of mortgagor and mortgagee, or lessor and lessee, or vendor and vendee. Burlingame v. Goodspeed, 153 Mass. 24, 26 N. E. 232; Trust Co. v. Boardman, 149 Mass. 158, 21 N. E. 239; Insurance Co. v. Boyden, 9 Allen, 123; Warwicker v. Bretnall, 23 Ch. Div. 188; Leeds v. Cheetham, 1 Sim. 146; Rayner v. Preston, 18 Ch. Div. 1; Kearney v. Kearney, 17 N. J. Eq. 59, 71. The contract of insurance is a personal contract, and inures to the benefit of the party with whom it is made, and by whom the premiums are paid. It is a contract of indemnity against loss. The sum paid "is in no proper or just sense the proceeds of the property." Lerow v. Wilmarth, 9 Allen, 382, 385; Insurance Co. v. Boyden, Id. 123; Wilson v. Hill, 3 Metc. (Mass.) 66; King v. Insurance Co., 7 Cush. 1; Insurance Co. v. Lawrence, 10 Pet. 507, 512.

It is not averred, and does not appear, that the defendant intended to make a present of the proceeds of the policy to the plaintiff, or was insuring for her benefit. Whether the amount of indemnity received by the defendant for her loss was more or less than the value of her interest cannot affect the plaintiff; nor can the defendant be converted into a trustee for the plaintiff by the mere fact that the amount which she received was equal to the full value of the house. It was paid to and received by her as indemnity for the loss which she had sustained, and, as already observed, does not stand in the place of the property insured. In Welsh v. Assurance Corp., 151 Pa. St. 607, 617, 25 Atl. 142, relied on by the plaintiff, there was evidence that the life tenant intended to insure for the benefit of herself and the remainderman. The plaintiff argues that

sound public policy requires that money received by a life tenant on a total loss by fire should be used in rebuilding, or should go to the remainderman, reserving the interest to the life tenant for life. This argument proceeds on the assumption that the proceeds of the insurance take the place of the property insured,—a view which, as we have seen, is contrary to our own and other decisions. If the contract of insurance is one of indemnity to the insured for the loss sustained by him, it is difficult to see how a sound public policy could be subserved by holding that he shall use what belongs to him for the benefit of some one else.

Life Insurance.

LEMON v. PHOENIX MUTUAL LIFE INS. CO.

Supreme Court of Connecticut, 1871. 38 Conn. 294.

SEYMOUR, J. * * * First, the fact that Mr. Peterson caused the policy to be made payable to Miss Lemon, indicates a settled purpose in his mind that she should have the benefit of it; and his acts immediately after will naturally be construed as intended to carry out such purpose. Second, when, therefore, the policy is by Mr. Peterson's order sent to Miss Lemon's brother, we naturally regard it as sent to him for her, as depositary for her, and for her benefit, rather than as depositary for Mr. Peterson himself. Third, it appears from the committee's report that the intended change in the policy for her benefit was communicated to her before it was made, and that it was upon her suggestion that the policy was placed in the hands of her brother. Fourth, after the policy was changed and made payable to Miss Lemon, and sent to her brother, she was informed by Mr. Peterson of what he had done. Upon these considerations, in view of all the facts in the case, we think we must find that there was an executed gift of the policy to Miss Lemon, and that the delivery to her brother was as depositary for her. * * *

It is clear that the consideration for policy number three was the surrender of policy number two. Mr. Peterson's health was such that number three would not have been issued if the company had not been bound by number two. And inasmuch

as policy number two belonged to the petitioner, it was her property that, without her consent, was used to procure number three. She is, therefore, equitably entitled to the benefit of this policy.

Right to Change the Beneficiary Reserved.

JORY v. SUPREME COUNCIL, AMERICAN LEGION OF HONOR.

Supreme Court of California, 1894. 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733.

GAROUTTE, J. The right of ownership to the proceeds of a $2,000 benefit certificate, issued by a mutual benefit society known as the "American Legion of Honor," forms the subject of this litigation. The society is not an active party to the litigation, having paid the money into court, and being entirely satisfied with the court's adjudication as to whom it belongs. The respondent and appellant are brother and sister, and the beneficiary certificate was taken out by the mother, Emily Kate Jory, and made payable upon her death to the daughter, appellant, or any other member of the mother's family whom she might thereafter in her lifetime designate. The by-laws of the society provide that members may, at any time when in good standing, surrender their benefit certificates, and have new ones issued, payable to such beneficiary dependent upon them as they may direct, subject, however, to the provisions of section 2: "Such change to be made upon petition to the supreme secretary, signed by the member desiring to make the change, attested by the secretary of the subordinate council, and having the seal of the subordinate council attached substantially in accordance with the form prescribed in this section. * * * The fee to be paid for a new certificate issued shall be one dollar, and must accompany the petition. No change of beneficiary shall be made in any other manner than herein prescribed, * * * provided that, in case of the loss or destruction of the old certificate, satisfactory evidence of such loss or destruction shall be produced, by affidavit or otherwise, before a new certificate be issued. * * * No act of a subordinate council in the admission of any member to

membership in this order, and no act of any member done for the purpose of changing his or her beneficiary, shall be recognized by or deemed binding upon the supreme council, or as entitling the person admitted, or the new beneficiary named, to any benefits from this order, unless such acts shall be in strict accordance with the provisions contained in the laws and constitution prescribed by the supreme council, nor until such acts have been ratified and approved by the supreme council." Several years after this certificate was issued, the mother became desirous to change the beneficiary named therein, to-wit, the appellant daughter, and to substitute therefor the respondent son; and in furtherance of such desire, and for the purpose of complying with the provisions of the laws of the society, she attempted to secure control of the original certificate, which was then in the keeping of her daughter appellant, in order that she might surrender the same to the society; but she was unsuccessful in this endeavor. Upon this question the court found the fact to be that "she (the daughter) refused to redeliver the same to said Emily Kate Jory, although frequently requested so to do by her, as alleged in said amended complaint, but kept and concealed the same for the purpose of endeavoring to prevent her said mother from designating the plaintiff herein as the beneficiary thereunder, and securing the said $2,000 herself, and so kept and concealed it until after her mother's death, as alleged in the amended complaint on file herein." And this finding is supported by the evidence. Being unable to secure the original certificate, the mother regularly took all the other steps required by the laws of the order for the purpose of changing the beneficiary, and accompanied her application for a change with an affidavit stating the reason why the original certificate was not surrendered, and further stating therein that she made her son, the respondent herein, her sole beneficiary under said certificate. The society still refused to issue the new certificate, upon the ground that the original was neither lost nor destroyed, and yet had not been surrendered. Matters remained in statu quo until the death of the mother, when this litigation arose between the children, and was decided by the trial court in favor of the son.

Laying aside any question of interest in the original bene-

ficiary certificate resting in the daughter by virtue of matters arising in parol between the mother and the daughter, we are clear that, as between the original beneficiary, the daughter, and the proposed new beneficiary, the son, the proceeds of this policy belong to the son. As between them, there was a substitution of beneficiaries in the eyes of a court of equity. If the Legion of Honor was here as an aggressive party, insisting, as against the claims of the son, upon a strict compliance with its by-laws before it could be compelled to take money from its treasury, possibly a different question would be presented; but, as between these parties litigant, the court will administer justice from the standpoint of equity, and bring to the solution of this question those broad principles upon the basis of which equity always deals. The general rule unquestionably is that a change of a beneficiary cannot be made by the insured unless a substantial compliance with the laws and regulations of the society is had; yet courts of equity have recognized various exceptions to this general principle, and the facts of this case bring it squarely within one of the well-recognized exceptions. This exception is builded upon the principle that equity does not demand impossible things, and will consider that done which ought to have been done; and is embraced within the proposition that, when the insured complies with all the requirements of the rules for the purpose of making the substitution of beneficiaries with which he has the power to comply, he has done all that a court of equity demands. See Supreme Conclave v. Capella, 41 Fed. 1, approved in McLaughlin v. McLaughlin (Cal.) 37 Pac. 865; Grand Lodge v. Child, 70 Mich. 164, 38 N. W. 1; Isgrigg v. Schooley, 125 Ind. 95, 25 N. E. 151; Marsh v. American Legion of Honor, 149 Mass. 512, 21 N. E. 1070. The present case comes squarely within this exception, and in principle is identical with some of the cases we have cited. For the purpose of changing the beneficiary, the insured complied in detail with every rule of the society, save the single one of surrendering the certificate, and this she was unable to do after using due diligence to that end. Impossibilities are not required, and if the certificate had been lost or destroyed, and thus the surrender made impossible, equity would have treated the surrender as duly made; and in legal effect the certificate was lost in this case. But there is another

well-settled principle of equity equally fatal to appellant's claims. No person can take advantage of his own wrong. No man is allowed to come into a court of equity and reap beneficial results from his own iniquity. If Mrs. Jory had the right to make the change of beneficiaries, and did all that it was possible for her to do towards making such change, but was prevented by the acts of appellant from a consummation of her intentions, then appellant will not be allowed to derive any benefit from her fraudulent conduct. If a fraud of her own practicing prevented a legal substitution of beneficiaries, then, as against her, an equitable substitution will be held to have taken place. If the insured, Mrs. Jory, had a legal right to make a change of beneficiaries at the time she attempted so to do, then the maxims of equity which we have applied to the facts of the case dispose of this litigation fully and entirely. But, as a further ground of defense to the action, it is insisted by appellant that her mother had no such right. Appellant says she had a vested interest in the certificate, and rights under it which could not be taken away from her by a legal substitution of beneficiaries, even if such substitution had been made by the insured. Under this claim of the appellant the question as to an actual substitution would seem to be immaterial; for, if the insured had proceeded under the rules and laws of the order, and obtained a substitution of beneficiaries perfect in all its parts, still, as between the parties here litigating, it would not be conclusive as establishing title to its proceeds in the holder thereof. For we are in a court of equity, and administering justice to these parties according to their equities.

The principle here under consideration is the most recent growth of mutual benefit association law, a branch of the law which in itself is young in years; and we know of nothing in the law which deprives a person contemplating membership in a mutual benefit association from so contracting with the proposed beneficiary as that, when such certificate is issued, equities in favor of the beneficiary are born, of such merit that the insured member has no power to defeat them. The few authorities shedding light upon this question declare the rights of the beneficiary are such as to create a vested interest in the proceeds of the certificate. Smith v. Society, 123 N. Y. 85, 25

N. E. 197; Nix v. Donovan (City Ct. N. Y.) 18 N. Y. Supp. 435; Maynard v. Vanderwerker (Sup.), 24 N. Y. Supp. 932. Possibly this is not a correct declaration of the principle of law applicable to the conditions; for a second beneficiary might be substituted, wholly innocent of the contractual relations existing between the insured and the first beneficiary, and his substitution give rise to the creation of equities in his behalf all-controlling upon a judicial disposition of the rights of the parties concerned. If the original beneficiary's interest was vested, no subsequent conditions could possibly arise which would defeat his right; and, for this reason, we think it can hardly be termed a vested interest. The whole matter seems to be rather a question of equities, and the stronger and better equity must prevail. The illustration we have used does not arise in the present case, for we here have no clash of equities. The second beneficiary possesses no equities. He is a volunteer pure and simple. His status during the life of the insured is well described in Smith v. Society, supra, where the court said: "The designation was in the nature of an inchoate or unexecuted gift, revocable at any moment by the donor, and wholly within his control." We think a court of equity should declare the insured estopped from substituting a second beneficiary of the character here involved, whenever sound equities are extant in favor of the first beneficiary; and, such estoppel being in force against the insured, it is equally in force and may be successfully urged against the volunteer beneficiary. The respondent is a volunteer beneficiary, and it only remains for us to ascertain from the record what the appellant's equities are, as disclosed by the evidence. She claims by her answer that she and her mother entered into a mutual agreement whereby each should join a mutual benefit society and make the other a beneficiary under the certificates issued, and that said agreement was carried out. Appellant further alleges that she paid all initiation fees, dues, and assessments upon the benefit certificate taken out by her mother. If these moneys were paid out by appellant under and by virtue of a contract between the parties, and in pursuance of this agreement and scheme for mutual insurance, then she has equities which entitle her to recognition in a court of justice, for it would be gross imposition and fraud upon her to allow the insured to

change her beneficiary under these circumstances. Though wrong and injustice form an unpleasant sight to a court of equity, yet that court will never close its eyes because the sight is an unpleasant one, but rather, with vision all the keener, will reach out its strong arm to protect the wronged and innocent party.

Judgment for plaintiff affirmed.

GRAND LODGE A. O. U. W. v. FRANK.

Supreme Court of Michigan, 1903. 133 Mich. 232, 94 N. W. 731.

MONTGOMERY, J. Charles P. Frank, a resident of Detroit, died on the 5th day of February, 1902, leaving at the time of his death, as his heirs at law, his wife, Anna Estella Frank, and his father, Lewis M. Frank. On April 8, 1887, Charles P. Frank took out a beneficiary certificate for $2,000 in the Ancient Order of United Workmen, making his wife, A. Estella Frank (Anna Estella Frank), the beneficiary thereunder.

The present bill is a bill of interpleader, setting out that on July 20, 1898, Charles P. Frank surrendered the beneficiary certificate, and took out a new one, payable to his mother, Elizabeth V. Simonton; that Mrs. Simonton died in January, 1900, and Charles P. Frank died in February, 1902. The bill further sets out that the heirs at law of Charles P. Frank are the defendants, Lewis M. Frank and Anna Estella Frank. In her answer, in the nature of a cross-bill, Anna Estella Frank avers that the attempted surrender of the certificate by Charles P. Frank, and the designation of the new beneficiary, made in July, 1898, were made at a time when Charles P. Frank was insane and mentally incompetent, and asked to have this fact so decreed, and that the attempted change of beneficiary be decreed to be null and void, and that the insurance money due be decreed to be paid to her. To this answer Lewis M. Frank demurred on the ground that the pleadings do not set up a right in defendant Anna Estella Frank to which the court can apply a remedy, and that she had no vested interest in the beneficiary certificate, and was not a party to the contract, and is not entitled to raise the question of the insanity of Charles P. Frank.

The answer sets up all the facts necessary to an understand-

ing of the case, and shows the defendant Anna Estella Frank entitled to the relief which she prays, unless it be held that she had no interest in the subject-matter as entitled her to raise the question of Charles P. Frank's mental incompetency. It is true that, as the beneficiary named in this certificate, she had no vested interest in the certificate of Charles P. Frank prior to his death; but she had a contingent interest which vested at his death, and, unless there is some imperative rule of law which precludes her from raising the question of his mental capacity, it should be held that she has the right to intervene in this manner.

It is the contention of the counsel for Lewis M. Frank that only Charles P. Frank himself, or his heirs at law, could raise the question of his mental incapacity. It is said that the transfer was not void, but voidable, and that the option of voiding it rests only with one having an interest; that during his lifetime Charles P. Frank had such interest, and that at his death his heirs at law are the only ones who had such interest. If this be the correct view, it must rest upon the ground that the heirs at law or representatives were entitled to raise the question because the right is devolved upon them under the statute of distribution or descent, and that one occupying the position of beneficiary, named by the voluntary act of Charles P. Frank, does not stand upon the same vantage ground. We think this distinction cannot be supported in reason or authority. It has been frequently held that the heirs at law may intervene in such cases after the death of the grantor to set aside a grant made by one mentally incompetent. Peters v. Peters, 101 Mich. 291, 59 N. W. 609; Curtis v. Brownell, 42 Mich. 165, 3 N. W. 936; Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512. In none of these cases had the party attacking the transaction any vested interest at the time of the alleged transfer. We think the better rule is that where such an attempt to change the beneficiary is made, and fails because of the want of mental capacity on the part of the assured, the original designation remains in force. Elsey v. Odd Fellows, 142 Mass. 224, 7 N. E. 844; Smith v. Railroad Association, 168 Mass. 213, 46 N. E. 626. A case quite in point is the recent one of Ownby v. Supreme Lodge Knights of Honor, 101 Tenn. 16, 46 S. W. 758.

CHAPTER VIII.

CREDITORS.

Life Insurance—Debtor as the Insured.

HOLMES v. GILMAN.

Court of Appeals of New York, 1893. 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566.

The following are the material facts:

In December, 1880, Arthur C. Gilman became a member of the firm of J. H. Labaree & Co., dealers in teas and coffees in New York City, and continued such member until his death, which occurred suddenly on the 15th of December, 1890. During all this time he was a trusted member of the firm, and practically had exclusive charge of its office affairs, which included the management of the firm bank account and the making of all notes and other paper issued in the business of the firm. For several years prior to his death he had prepared semiannual statements purporting to show the financial condition of the firm, and these statements he had rendered to its different members. The last one had been rendered as of the date December 1, 1890, and showed the firm with assets exceeding liabilities by nearly the amount of $200,000. This statement was received by the plaintiff (who resided in Cincinnati) about December 11, 1890. For some reason, which is not made plain by the proof, and soon after the above date, the members of the firm commenced an examination as to its condition, and the examination was not concluded until after Gilman's death, when it was discovered that the firm was insolvent by more than $36,000. Further investigation brought to light the fact that Gilman, commencing in the year 1882, and continuing down to his death, had wrongfully and fraudulently taken from the assets of the firm large sums of money, which he had wrongfully appropriated to his own use. By reason of this dishonest conduct on the part of Gilman the firm was, in De-

cember, 1890, insolvent, instead of having a surplus of nearly $200,000, as shown by his last statement. The amount wrongfully taken by him was over $220,000, and it was done by means of false entries in the books of the firm, spread over the period of about eight years. There were found among his papers in the safe at the office of the firm four policies of insurance upon his life; one for $5,000, issued and dated March 9, 1880, and three other policies, aggregating $45,000, and issued between the dates of April, 1884, and January, 1888. Also two certificates of his membership in a benefit association, one dated in August, 1881, and the other in January, 1885. Each of the four policies was issued on Gilman's application, made in the name of his wife, and each was in terms payable to her. The certificates were also issued on his application, signed by him, in which he stated he desired his death loss to be paid to his wife. It does not appear that any of the premiums upon any of the policies were paid by Mrs. Gilman, or with funds provided by her, or that she had any knowledge of the existence of the policies prior to her husband's death. All of the premiums on the above-mentioned policies, aggregating about $4,000, were paid by Gilman out of the firm funds, and the premiums which fell due after the year 1882 on the above-mentioned $5,000 policy were also paid from such funds.

When the firm was discovered to be insolvent, the plaintiff provided funds for the payment of its debts and the continuance of its business. The policies of insurance having been collected and paid into the trust company, the plaintiff and the defendant Mrs. Gilman each claimed the right to recover the whole sum, amounting to over $56,000. The referee awarded the above-mentioned $5,000 policy, which was dated and issued in March, 1880, to the defendant, subject to the lien of about $1,000 of premiums becoming due subsequent to 1882, and paid by Gilman out of the funds of the firm. The policy itself was taken out prior to any conversion of firm funds, and the premiums thereon prior to 1882 were paid by Gilman out of his own funds. The policies aggregating $45,000 were obtained and maintained, as the referee finds, from the funds of the firm, which the evidence traces and identifies as thus invested.

PECKHAM, J. * * * The claim of the plaintiff to recover the moneys arising from the payments of these policies is based upon the principle which allows a cestui que trust to follow trust funds, and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the trust fund can be clearly ascertained, traced, and identified, and provided the rights of bona fide purchasers for value without notice do not intervene. The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the cestui que trust has his option to claim the property and its increased value as representing his original fund. The right to follow and appropriate ceases only when the means of ascertainment fail. It is a question of title. Van Alen v. Bank, 52 N. Y. 1; Newton v. Porter, 69 N. Y. 133; Ferris v. Van Vechten, 73 N. Y. 119; Cavin v. Gleason, 105 N. Y. 256, 260, 11 N. E. Rep. 504; In re Hallett's Estate, 13 Ch. Div. 696. It is somewhat akin to the principle decided in Silsbury v. McCoon, 3 N. Y. 379, where corn was wrongfully taken from its owner, and converted into whisky. The court held the property was not changed in the hands of the wrongdoer, and the whisky belonged to the owner of the original material, no matter how much it had been increased in value. The case of Pennell v. Deffell, 53 Eng. Ch. 372, 388, 389, discusses the principle as thus stated, and agrees to it. That a partner occupies a fiduciary position with regard to his copartners and the funds of the firm, and will not be permitted to make a personal profit out of the use of such funds, is, I think, clearly established. 1 Lindl. Partn. (2d Amer. Ed.) 303; Featherstonhaugh v. Fenwick, 17 Ves. 298; Anderson v. Lemon, 8 N. Y. 236; Mitchell v. Reed, 61 N. Y. 123; Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. Rep. 924. Although partners do not, in the strict sense of the term, occupy the position of trustees towards each other and towards the firm funds, yet the position is one of a fiduciary nature, calling for the maintenance and exercise of the greatest good faith between them. Such a relationship authorizes the same remedy on behalf of the wronged partner as would exist against a trustee, strictly so called, on behalf of a cestui que trust. Per Jessel, M. R., in Re Hallett's Estate,

13 Ch. Div. 696, 712. While legally incorrect to describe the fraudulent abstractions made by Gilman of the funds of the firm as embezzlements, the description is harmless. It was a monstrous and gross breach of the duty he owed the firm, and the right of the firm to follow the funds is not affected because the act could not be regarded in law as an embezzlement. The right to follow the funds springs from the fiduciary nature of Gilman's position with regard to them. These general positions are not really denied by the defendant. It is claimed, however, that the tracing and identification of the funds have not been sufficiently proved in fact, and it is also urged that there has been an actual mingling of the firm funds with the private funds of Gilman in the purchase and maintenance of the policies. I have looked carefully through the evidence upon these questions of fact, and I think the findings of the referee are fully sustained, and that no exception can prevail on such grounds. If these preliminary questions be decided against him the counsel for defendant then urges that the rule clearly is, if the trust fund has become mingled with money or property of the trustees or others, equity impresses the proceeds with a trust to an amount equal to the original trust fund and interest, and will go no further. He then claims that the firm funds which went to the purchase of the policies and the payment of the annual premiums were mingled with the property right of the wife, called her "insurable interest" in her husband's life, and so the policies were not wholly the result of the use of those firm funds, and therefore the plaintiff can have only a lien on the policies or the money arising from their payment, to the amount of the premiums paid with the firm funds, and the interest thereon. This is really the chief question in the case.

Where moneys have been misapplied, and have been used as a portion of a larger amount, which has been invested in other property, the property thus acquired does not, as a whole, belong to the owners of the moneys misapplied. It does not belong to him because it has not been purchased or acquired wholly with his money or funds, and hence it is that such property is held charged with a lien at least to the amount of the trust funds invested in it. It is not necessary to here decide it, because we take another view of the facts, but I am

not at all prepared to admit that under no circumstances is the cestui que trust entitled to recover back anything more than the amount of his property and interest, where there has been a mingling of funds. In case the trustee took a thousand dollars of trust funds and five hundred of his own, and purchased property, which advanced in value to twice its original sum, I have seen no case where the point has been determined that the whole increased value belongs to the trustee, and that only the original sum wrongfully taken, and interest, can be given to the cestui que trust, although it was by reason of the wrongful use of the trust funds that the trustee was enabled to realize such value. If, in such case, the cestui que trust were not allowed to at least participate proportionately in the increased value, it would appear to be a violation of the principle that the trustee cannot ever be permitted to make a profit out of the use of the trust funds. It seems to me to be a case for the application of the doctrine that the parties became coowners of the property at the option of the cestui que trust, in the proportion which their various contributions bore to the sum total invested. In this case, however, the defendant is enabled to claim a mingling of funds and property only by treating the right of a wife to insure the life of her husband for her benefit as a species of property which has been mingled with the funds of the firm, the result of the combination being the procurement of the policies.

We do not regard this right as property in any such light as to bring the case within the principle of the authorities upon the subject of a mingling of funds in the purchase or acquisition of other property. The right of a wife to insure the life of her husband for her own benefit is not property. It is more in the nature of a power or a privilege to make a valid contract. It is a status and not a property right. The common law, upon motives of public policy, held that there must be what was termed an "insurable interest" in the life which was insured, or else the policy was a dangerous kind of a wager, and therefore void. To take a policy out of such a class it was necessary to show that the insured had some interest in the continuance of the life of the cestui que vie. Who had such an interest as to give a right of insurance was frequently a matter of some discussion and of possible doubt. It may not

even now perhaps be said that the precise nature, character and extent of the interest in another's life, which shall render that life insurable, have been formally and plainly laid down. It is said by the federal supreme court that one essential is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. Insurance Co. v. Schaefer, 94 U. S. 457, 460. An interest which is insurable must be an interest in favor of the continuance of the life, and not an interest in its loss or destruction. If any person could be thought to have an interest in the continuance of the life of another it would be a wife in the life of her husband. Judge Allen, in Baker v. Insurance Co., 43 N. Y. 283, regarded the question as decided that a wife had at common law an insurable interest in the life of her husband. Judge Andrews held to the same effect in Brummer v. Cohn, 86 N. Y. 11, 14. These cases favor the view that the statute upon the subject of the insurance of the husband's life in favor of his wife, while it regulates, does not create, the right. I do not intimate that, if the statute created the right, it would in any way alter its nature. That such a policy was valid at common law simply makes it clearer that it is the nature of the relationship between man and wife that makes the policy valid, and relieves it from the objection that it is a wager policy. That relationship is not property in any fair sense of the term. It creates an insurable interest in the life of another, of a nature the same as a parent has in a child or a child in a parent; that is, an interest in the preservation of the life, and not in its destruction. Being so circumstanced, a policy of insurance upon such life is not a wager policy, and is therefore a valid policy. It is the same question, but it may perhaps appear a little clearer when it is asked whether the power or privilege of a parent or child or creditor to insure the life of his parent or child or debtor is property. A man has an insurable interest in his own life. If he take trust funds and procure such insurance, has he thereby mingled those funds with other property, i.e., with his right to insure his own life? And can it be said that the policy is the product of such mingled funds and property, so that nothing but the original amount of the trust funds and interest can be recovered back from the estate? The fact is apparent that a policy

of insurance upon a life is not a policy of indemnity. The sum named in the policy is to be paid when the insured life has ceased, no matter how really valueless such life may have in the meantime become. The power of the wife to procure insurance is not in the least unfavorably affected by the fact that insurance in her favor has already been secured. As was said by Shaw, C. J., in Loomis v. Insurance Co., 6 Gray 396, the amount of the insurance is immaterial. The premium is computed, upon the law of averages, to be the exact equivalent for the risk. So, if insurance had been taken out by the husband on his life in the wife's name, she could herself take out more upon just as favorable terms, and just as expeditiously as if none had been taken. No one company might desire to go above a certain amount upon any one risk, but the ability to procure further insurance is practically unrestrained. The wife has therefore suffered no loss by the original procurement of this insurance, and its subsequent maintenance unknown to her, so long as the premiums have not been paid with her moneys or in any way from her estate. In other words, her property has not been used for any purpose. Her power to obtain valid insurance upon his life remained wholly unimpaired and unaffected by the insurance already obtained. The fact that she had what is termed an "insurable interest" was only material for the purpose of upholding the validity of the insurance in question. I cannot see how it can be regarded as property in any event. That a life insurance policy has not the features of a contract of indemnity, and is not such a contract, has been unquestioned for a number of years. Rawls v. Insurance Co., 27 N. Y. 282; Olmstead v. Keyes, 85 N. Y. 593.

The case of these policies is very much like that in Baker v. Insurance Co., supra, where Judge Allen said the insurance was effected by the husband for the benefit of his wife, and as a provision for her in case of his death. It was there stated that the case would not be changed if the policy were regarded as having been procured by the wife, because the husband was in truth the actor, and represented the wife, and she, in claiming the benefits of the policy, necessarily ratified and confirmed the compact as it was made, and with all its terms and conditions. Therefore this case is to be looked at with reference to the fact that every dollar of the moneys which procured and

maintained these policies in existence belonged to the firm represented by the plaintiff, and that Gilman had no more right to invest or use these funds in the manner he did than would any third person who had procured them without any right or title. It has been said that the husband, when he procures an insurance for his wife's benefit, acts as her agent, or represents her, and that she has a vested interest in the policies the moment they are delivered by force of the statute permitting them to be made in this form. Whitehead v. Insurance Co., 102 N. Y. 143, 6 N. E. Rep. 267. This is doubtless true in the case of the husband procuring the insurance with funds which belong to him or to his wife, but where the premiums are paid with moneys which in truth do not belong to him, and which the husband misapplies in so paying, and by which he violates his obligation to the true owner of the moneys thus used, the wife in such case must claim the policy subject to the means by which the husband procured it, and she must adopt all his methods. The moneys in the hands of the company could not be recovered back by the cestui que trust if received by the company in good faith, because it would stand in the position of a bona fide purchaser, yet the policy itself would stand as the representative of these trust moneys, and the right of the wife would be to that extent subordinate. This principle has, in effect, been decided in New Jersey in the case of Shaler v. Trowbridge, 28 N. J. Eq. 595. It was there held, upon almost identical facts, that there was no public policy which favored the wife at the expense of the principle that trust funds could be followed, and that no profit could in any way arise in favor of the trustee who used them. It also held that the wife could not be permitted to avail herself of the proceeds of policies paid for by her husband with trust funds. It is true in that case the policies were originally taken out in the name of the husband, and subsequently made payable to the wife, and it is urged that there is a difference in the two cases, because in the New Jersey case it was the husband's insurable interest which was insured, and then assigned, and that in this case it is the wife's interest which was originally insured; but we hold, upon the facts in this case, that the taking out of the policies in the name of the wife does not alter the principle as to trust funds. The cestui que trust is entitled

to follow his funds, and to take the moneys or the policy at his option.

The case of Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. Rep. 41, is not in point. The moneys there used were in truth the property of the husband, although he was insolvent, and he used some of his property to purchase insurance for the benefit of his wife and children. The supreme court held that a policy of insurance taken out by the husband in the name and for the benefit of the wife made the contract a contract with the wife, and that, even though the premiums were paid by the insolvent husband, with moneys which, or some part of which, ought to have been used for the payment of his debts, yet, if there were no fraud as between the wife and the company, the wife could hold the policy as against the creditors of the husband, except the amount which had been wrongfully used in the payment of premiums. If the amount of the husband's estate used to pay premiums were no more than reasonable and moderate under the circumstances, it was further held that the creditors could not recover back the moneys so paid for them, although the husband was, at the time of their payment, insolvent. It was said the interest insured did not belong to the husband or his creditors; that the contracts were not payable to the husband, his representatives, or his creditor; that no fraud on the part of the wife, the children, or the insurance company was shown or pretended; and that there was no gift or transfer of the debtor's property, unless the amounts paid for premiums were to be held as excessive. That is a very different case from the one under consideration. It was no trust fund (within the meaning of that term when used to authorize the following thereof) which went to pay for the policy in that case. The moneys belonged to and were the property of the husband. They might, under certain circumstances, be reached in proceedings after judgment and return of execution, but the title was in the husband, and he used his own property to procure the insurance. Having done so, the policy thus procured became a contract with the wife, and her insurable interest in her husband's life was thus made effectual. The creditors could not follow the moneys into other property, and demand such property. No principle of following trust funds was involved.

In this case, however, there is the fact which alters and colors the whole transaction, and is fundamental and controlling in its nature, and that fact is that the moneys which procured the insurance were trust moneys, and, although invested in the policies, they were subject at the very moment of such investment to the right of the owner of the funds to follow them into whatever change of form they might assume, and to claim the thing into which they were changed as if it were the original fund. In the case in the federal court the whole matter was discussed with reference to the violation of the statute of Connecticut, based upon the statute of Elizabeth (13 Eliz. c. 5) prohibiting the transfer of the property of an individual in fraud of his creditors. We have a statute to the same effect, 2 Rev. St., p. 137, § 1. The learned chief justice said that the statute was passed to prevent debtors from dealing with their property to the prejudice of their creditors, but dealing with that which creditors irrespective of such dealing could not have touched was within neither the letter nor the spirit of the statute. This was spoken of the insurable interest of the wife, and it was spoken in regard to creditors as that term is generally used. In this case it is not in the simple character of a creditor of Mr. Gilman, or of the defendant Mrs. Gilman, that the plaintiff asks relief. He seeks the aid of a court of equity to enable him, in the character of a cestui que trust, to follow his property which was wrongfully converted by one bearing towards him the obligations of a trustee, and by such trustee invested in these policies, and such cestui que trust now asks, in substance, for his own property, or for the property into which his trust funds were wrongfully converted, and we think he has the right to recover the property which represents and stands in the place of the original trust fund. The case in the federal court is not at all parallel, and is, therefore, no authority against our contention. Whether at common law or under the provisions of our statute the procurement of policies of insurance in the wife's name, under the facts developed in this case, does not prevent the cestui que trust from following and claiming the trust funds or their proceeds. If the proceeds of these policies had been greater than the whole amount of the indebtedness of the husband to the cestui que trust, arising out of the husband's

breach of trust, we do not decide what might in equity be the different rights of the wife and such cestui que trust in the balance, or whether any different rule could be logically applied. The husband in this case converted over $200,000 of what stood in the nature of a trust fund, and the plaintiff recovers only a little over one-fourth thereof in case the judgment on the referee's report be affirmed. We simply decide the case now before us. * * *

Creditor as the Insured.

AMICK v. BUTLER.

Supreme Court of Indiana, 1887. 111 Ind. 578, 12 N. E. 518.

MITCHELL, J. * * * This is a case in which a debtor, presumably at the solicitation of his creditor, effected an insurance on his own life for the benefit of his creditor, the latter being designated in the policy as the beneficiary, and agreeing to pay the expense of effecting the insurance, and of keeping the policy in force. It was also agreed that the debtor might at any time pay the debt, and reimburse the creditor for outlays in effecting and maintaining the insurance, and thereby entitle himself to an assignment of the policy. * * *

It was entirely at the option of the debtor whether or not he would reimburse the creditor for the sums expended in procuring the insurance. Whatever the creditor might have done in respect to the collection of his debt, it was beyond his power to compel the insured to reimburse him for his advances in procuring and maintaining the policy. The debtor had not agreed to repay advances voluntarily made. The advances having been made for the creditor's own benefit, he had no remedy against the debtor, or his legal representatives, to recover them. The rule in cases involving analogous principles is that where the owner of property vests the title absolutely in another, in pursuance of an agreement which gives the grantor the option to repurchase or not at his election, the transaction does not create a mortgage. Voss v. Eller, 109 Ind. 260, 10 N. E. Rep. 74; Hays v. Carr, 83 Ind. 275.

The right to the policy, and to the benefits to be derived therefrom, were absolute in the beneficiary until both the debt

and the advances were paid, even conceding that the oral agreement referred to would have been enforceable in the lifetime of the insured. The beneficiary in a life policy who has an insurable interest in the life of the insured at the inception of the policy may enforce payment for the full amount, notwithstanding the debtor on whose life it runs may have paid the debt. "Any interest sufficient to justify the insurance, and relieve it of the gambling aspect, will render it valid, and such policy will continue valid in the hands of a beneficiary or assignee, regardless of the cessation of interest, provided the facts show entire good faith and a sufficient justification." Hine & N. Life Ins. 82; Olmsted v. Keyes, supra; Connecticut Mut., etc., Co. v. Schaefer, supra. Perhaps owing to the particular nature of contracts, such as we are considering, if the debtor in his lifetime had tendered the amount of the debt and the advances, the claim of the legal representative might be supported. But, in the absence of an offer to comply with his agreement, we can discover no rational ground upon which the court can now compel the appellant to surrender money to which, according to every principle of law, he has a perfect title, and in which neither the debtor nor his representatives ever had any interest, legal or equitable.

A distinguishing element in the determination of cases of this character is whether the one whose life is insured so contracts himself to pay the premiums that an action could be maintained against him by the creditor for that amount. If such a contract is shown, then the policy is to be regarded as a collateral security, and the debtor is entitled to it upon the extinguishment of the principal debt; while, on the other hand, if the creditor pay the premiums, and the debtor is under no obligation to repay them, the right of the creditor is absolute. Freme v. Brade, 2 De Gex & J. 582; Knox v. Turner, L. R. 5 Ch. 515; Gottlieb v. Cranch, 4 De Gex, M. & G. 440; Godsal v. Webb, 2 Keen 100. * * *

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FORMS

COMPILED BY

FRANCIS L. HARWOOD, A.B., LL.B.*

CHAPTER I.

COMMERCIAL FORMS.

A. Agreements.

1. Agreement for Submission to Arbitration.

AGREEMENT, Made this.....*fourth*.....day of.....*June*.....A. D. ....*1914*....between....*Bricklayers' Union Local No. 52*....of the one part and....*Employers' Association of Scranton, Penna.*,....on the other part:

WHEREAS, disputes and differences have arisen and are still subsisting between the said parties relative to wages per hour which shall be paid the members of the party of the first part and in regard to other matters:—

NOW, it is hereby agreed that the said disputes and differences shall be referred, and the same are hereby referred, to the arbitration and determination of.....*Henry Black*.....and.....*John Jones*...., of.....*Scranton, Penna.*,....arbitrators nominated by the said parties, respectively; or, in case they shall not agree in making an award, then, as regards the matter or matters as to which they shall not agree, to the arbitrament of such person as the said arbitrators shall in writing, under their hands, before they enter on the business of the reference, appoint:

PROVIDED, that said arbitrators make and publish their award in writing signed by them, and deliver the same to said parties or either of them, on or before the....*fifth*....day of....*July, next*...., or on or before such subsequent date, to which the said parties shall by writing, under their hands, extend the time for making said award.

AND IT IS FURTHER AGREED, that the costs of the reference and award shall be in the discretion of said arbitrators, or umpire, who may direct to and by whom the same shall be paid.

IN WITNESS WHEREUNTO, the said parties have set their hands and seals, the day and date first above written.

[SEAL] *BRICKLAYERS' UNION, LOCAL No. 52*,.... ....*John Michael, Secretary*.... By....*Henry Grady, President*....

[SEAL] *EMPLOYERS' ASSOCIATION*,..... ....*Henry Frank, Secretary*.... By....*John Schmidt, President*....

* Of the Chicago Bar.

2. Agreement for Sale of Business with Good Will.

AGREEMENT, Made this....*tenth*....day of....*August*...., A. D. ....*1914*,....between....*Albert Jones*...., of the first part, hereinafter called the....*vendor*...., and....*William Prentiss*...., of the second part, hereinafter called the....*vendee*....: WHEREAS, the said....*vendor is a merchant*...., and....*is*....and....*has*....been for the period of ....*five*....years heretofore engaging in the....*retail grocery business*.... at....*223 West 63rd Street*....in the....*City*....of....*Chicago*...., and in such business....*is*....carrying a large stock of merchandise, the amount and full value of which have been appraised by an expert accountant selected by the parties hereto and the value thereof has been fixed at the sum of ....*Eighteen Hundred ($1,800.00)*....Dollars; and WHEREAS, in addition thereto the said....*vendor has*....given credit to various customers and at the present time....*has*....outstanding on....*his*....books uncollected accounts to the value of....*Five Thousand, Two Hundred Fifty ($5,250.00)*.... Dollars, most of which said....*vendor believes*....to be good and collectible, but whose soundness....*he does*....not warrant; and WHEREAS, said ....*vendor has*....in the conduct of....*his*....business contracted certain liabilities for goods and merchandise bought to the amount of....*Two Thousand, Four Hundred ($2,400.00)*....Dollars; and WHEREAS, said....*vendor desires*....to sell....*his*....business and said....*vendee desires*....to purchase same and conduct the business in place of said....*vendor*....:

NOW THESE PRESENTS WITNESS, that in consideration of the sum of....*Four Thousand ($4,000.00)*....Dollars, to....*him*....in hand paid, said....*vendor does*....hereby sell and convey all....*his*....right and interest in and to said business and from this day forth said....*vendee agrees*....to assume all responsibility under any lease for rent of the building in which said retail business is conducted, or for any contracts for the delivery of merchandise purchased by said....*vendor*....which have heretofore been entered into by said....*vendor*....

IT IS FURTHER AGREED by and between the parties hereto that said....*vendor*....will not conduct any retail business within a radius of...*two*...miles of the store herein referred to for a period of...*five*... years hereafter. Said....*vendor*....likewise....*conveys*....to said....*vendee*....the good will of said business.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and date first above written.

Witnesses:

....*JAMES SMART*.... *ALBERT JONES*.....[SEAL]

....*HENRY WARD*.... *WILLIAM PRENTISS*....[SEAL]

3. Agreement Not to Engage in Same Business.

AGREEMENT, Made this.....*ninth*.....day of.....*July*.....A. D. ....*1914*....by and between....*John Smith*...., of....*1207 W. Huron Street, Chicago*...., in the County of...*Cook*...., and State of....*Illinois*, *party*....of the first part, and....*Frank Ward*...., of....*14 W. Erie*

Street, Chicago...., in the County of....*Cook*...., in the State of ....*Illinois, party*....of the second part:

WHEREAS, said parties are....*physicians*...., and have heretofore engaged in the....*practice of their profession*....in the....*City*....of ....*Chicago*...., and WHEREAS, ...*Frank Ward has*....paid....*John Smith*....the sum of....*Five Hundred* (*$500.00*)....Dollars.

NOW, THEREFORE, said....*John Smith*...., in consideration of said payment, ...*agrees*.... not to....*practice his profession*....within a radius of....*ten*....miles of said....*City*....of....*Chicago*....at any time within the next....*twenty*....years.

AND for the true and faithful performance of this agreement....*John Smith binds himself*....unto....*Frank Ward*....in the penal sum of ....*One Thousand* (*$1,000.00*)....Dollars, as fixed and liquidated damages to be paid by....*him*....if....*he*....should fail to perform the above agreement.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names on the day and year first above written.

Witnesses:

....*WILLIAM DUDLEY*..... *JOHN SMITH*.....[SEAL]
....*ARTHUR STRAWSON*.... *FRANK WARD*....[SEAL]

4. Agreement for Erection of Building.

THIS AGREEMENT, Made this.....*seventh*.....day of.....*June*..... A. D....*1914*....between....*Oscar Peterson, Dixon, Illinois, party*.... of the first part, and....*August Kemp, Freeport, Illinois, party*....of the second part:

WITNESSETH, That the said....*party*....of the first part, for and in consideration of the payment to be made to....*him*....by the said second ....*party*....as hereinafter provided, ...*does*....hereby covenant, contract and agree to erect and finish a....*stone and brick*....building on Lot....*Six* (*6*).....Block.....*Four* (*4*).....of.....*Parker's Addition*.....to the ....*City*....of....*Freeport, Illinois,*....according to the plans, specifications and drawings, made by....*John Arnold, Architect*...., in good, substantial and workmanlike manner, to the satisfaction of, and under the direction of the said....*Architect*..... And said first....*party*....also ....*does*....agree to find, provide and furnish such materials of such kinds and qualities and descriptions as shall be fit, proper and sufficient for completing and finishing said building according to said plans and specifications; and to finish said building by....*August first,*....A. D.....*1915*.... And the second....*party*....for and in consideration of the first....*party*.... completely and faithfully executing the aforesaid work, and furnishing all the materials therefor, so as fully to carry out this contract, and the design according to its true spirit, meaning and intent, and by and at the times mentioned, and to the full and complete satisfaction of said....*August Kemp*....and....*John Arnold, does*....hereby agree to

pay to said....*party*....of the first part the sum of....*Twenty-five Hundred* (*$2,500.00*)....*Dollars*, in manner following, viz.: ....*Five Hundred* (*$500.00*)....Dollars when the work is started; ....*Five Hundred* (*$500.00*).....Dollars when the foundation of said building has been laid, and....*One Thousand, Five Hundred* (*$1,500.00*)....Dollars on the completion of said building in a satisfactory manner as aforesaid.

IT IS FURTHER AGREED that all work exhibited or provided to be done in the plans or drawings, and not mentioned in the specifications, or vice versa, shall be executed and performed in like manner as if the same were fully mentioned and described in each thereof, respectively, without extra charge.

IT IS ALSO FURTHER AGREED that the said....*party*....of the second part may make all alterations by adding, omitting, or deviating from the aforesaid plans, drawings and specifications, or either of them, which....*he*....shall deem proper, and said....*Architect*....shall advise without impairing the validity of this contract, and in all such cases the said....*Architect*....shall value or appraise such alteration, and add to or deduct from the amount herein agreed to be paid to said first....*party*.... the excess or deficiency occasioned by such alteration. It is further agreed that in case any difference of opinion shall arise between said parties in relation to the contract, the work to be performed under it, or in relation to the plans, drawings and specifications hereto altered, the decision of....*John Arnold, the Architect*...., shall be final and binding on all parties hereto.

IT IS FURTHER AGREED that the....*party*....of the second part shall not in any manner be answerable or accountable for any loss or damage arising from negligence or carelessness of the first....*party*....to any person or persons and their property (loss or damage by fire excepted); also that all the foregoing conditions and stipulations shall be mutually binding upon executors, administrators and assigns.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

Witnesses:

....*JAMES WARD*..... *OSCAR PETERSON*....[SEAL]

....*HARRY SMITH*.... *AUGUST KEMP*.....[SEAL]

5. Agreement for Church Subscription.

WHEREAS, The trustees of the....*West End Methodist Episcopal Church*...., in the....*City*....of....*Chicago*...., are about to erect a church for such corporation:

NOW, THEREFORE, we, the undersigned, for the purpose of such erection, in consideration of our mutual promises, hereby agree to and with such trustees and to and with each other, to pay to....*Albert Jones*...., the Treasurer of said corporation, or....*his successor*....in office, the respective sums set opposite to our several names. And we hereby authorize and direct said trustees to expend such sums in the erection of said church.

Said sums are due and payable to the said Treasurer on or before the ....*third*....day of....*January*....A. D.....*1914*....

JAMES WARD..... [SEAL]
HARRY WILLIAMS.... [SEAL]
FRANK WILSON ..... [SEAL]
HENRY SMITH..... [SEAL]
JOHN TROMBY.....[SEAL]
.....[SEAL]
.....[SEAL]

6. Agreement for Agency and Commissions.

THIS AGREEMENT, Made this....*tenth*....day of....*May*....A. D. ....*1914*....between....*Northwest Retail Company*...., hereinafter called the....*company*...., and....*Henry Renner*...., of....*Rockford, Illinois*...., hereinafter called....*retailer*....:

WITNESSETH, The said....*company agrees*....to furnish to said ....*retailer*....at....*Rockford, Illinois*...., the different varieties of ....*Lakeside Brand canned goods*....for a period of....*two years*.... from date for the purpose and with the object that said....*retailer*....shall become the....*agent*....of said....*company*....to sell, vend and dispose of the same in accordance with and in consideration of stipulations and terms hereinafter following:

Said....*retailer*....shall carefully deposit and preserve in....*his*.... store all such goods as may be sent or transmitted to....*him*....by said ....*company*...., but no goods shall be sent except upon the request of said....*retailer*....

In managing and conducting such agency, said....*retailer*....shall use ....*his*....best endeavors and skill to procure the greatest possible sale of the goods. In selling upon credit said....*retailer*....shall be circumspect and cautious and make due inquiries from reliable persons as to the solvency of purchasers and shall not sell to persons who are insolvent. No credit shall be given at any time to any person or persons for a greater length of time than....*six months*...., nor to any one person for a greater amount than....*Two Hundred* (*$200.00*)....Dollars, without the consent of said....*company*....

Said....*retailer*....shall account for all goods and transmit to said ....*company*....all moneys, bills and securities received from the sale of the goods at the end of each month and without further demand. ...*He*... shall keep books of account in which....*he*....shall enter all goods received from said....*company*....and all goods sold, to whom, whether for cash or credit, and any other matters which in any wise concern said agency. ....*He*....shall preserve all such books of account and in case of final adjustment....*he*....shall deliver them to said....*company*.... On the ....*first Tuesday*....after the....*first Monday*....of each and every year ....*he*....shall take an inventory of all the stock on hand and accurately balance up all books of account and report the condition of said business to said....*company*....

Said....*retailer*....shall provide....*himself a clerk*....at the expense of said....*company*....at....*a salary*....not to exceed....*Seventy-five* (*$75.00*)....Dollars per month.

Said....*company*....shall at all seasonable hours of business days have access to said books, or any other documents concerning the business of said agency.

IN CONSIDERATION of the true and faithful performance of the covenants herein contained the said....*company*....shall pay quarterly or cause to be paid unto said....*retailer*....the sum of....*Thirty* (*30*).... per cent of the total amount of the sales made by said....*retailer*.... All other expenses relating to the conduct of said business shall be borne by said....*retailer*....

Said....*retailer*....shall not be answerable for any loss or damage which may happen to any goods or merchandise sent....*him*....before the same actually come into....*his*....care and custody. For losses or damage happening to goods in....*his*....charge or care said....*retailer*....shall not be answerable unless the same happens through....*his*....wilful neglect or omission.

Said....*retailer*....shall advertise said....*company's*....goods and shall do....*his*....best to put the goods before the public favorably. Said ....*retailer*....shall not handle any other brand of canned goods either on....*his*....own account or as....*agent*....

IT IS FURTHER MUTUALLY AGREED that said relation may be terminated at any time by either party on giving the other....*one month's*....notice in writing, except in case of breach, when the same shall be forfeited absolutely, and upon any breach hereof said...*retailer*... shall turn over to said....*company*...., or....*its*....agent, all money, securities, books of account, goods on hand, or anything appertaining to or concerning said business. To that end said....*retailer*....shall give said ....*company his*....bond, with sureties, executed in the penal sum of ....*One Thousand* (*$1,000.00*)....Dollars, conditioned to be void upon compliance with the terms of this contract.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

[SEAL] *NORTHWEST RETAIL COMPANY*,....
Attest: *By....James Simpson, President*....
....*Henry Jones, Secretary* *HENRY RENNER*.....[SEAL]

7. Agreement Reviving Outlawed Debt.

THIS AGREEMENT, Made this....*fifth*....day of....*June*....A. D. ....*1914*....between....*Richard Hart, party*....of the first part, and ....*John Schmidt, party*....of the second part:

WHEREAS, on the....*sixth*....day of....*May*....A. D.....*1910*...., said....*Richard Hart*...., being then....*a minor*...., purchased of said ....*John Schmidt a watch*...., for the sum of....*Twenty* (*$20.00*).... Dollars, and having now attained....*his majority*....and being desirous of ratifying the purchase, for the purpose of giving full effect to....*his*....

liability for the payment of such debt, HEREBY EXPRESSLY.....*acknowledges*....the said debt to be justly due to said....*John Schmidt*...., and....*agrees*....to pay same within....*ten*....months from the date hereof, together with interest at the rate of....*five*....per cent per annum.

AND the said....*John Schmidt*....hereby....*agrees*....that....*he*.... will not sue for or require payment of the said amount until on and after ....*ten*....months from date.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals, the day and year first above written.

RICHARD HART....[SEAL]
JOHN SCHMIDT....[SEAL]

8. Agreement of Employer with Employee.

THIS AGREEMENT, Made this....*fourth*....*day* of....*June*....A. D. ....*1914*....between....*Oscar Jones*....of....*Pana, Illinois,*....of the first part, and....*Will Henderson*...., of the second part:

WITNESSETH, That the said....*Will Henderson*....agrees to serve said....*Oscar Jones*....faithfully and diligently as....*clerk*....for the period of....*one year*....from date.

IN CONSIDERATION of such service so to be performed, the said ....*Jones*....agrees to pay the said....*Henderson*....the sum of....*Sixty* (*$60.00*)....Dollars per month, payable....*semi-monthly*....during said term.

And it is understood and agreed that....*neither party*....may terminate this agreement without the consent of the other....*party*....except in case of the death of....*either party*...., which shall at once terminate this agreement.

IN WITNESS WHEREOF, said parties have hereunto set their hands and seals, the day and date first above written.

OSCAR JONES .....[SEAL]
WILL HENDERSON....[SEAL]

9. Agreement for Bearing Expenses of Litigation.

THIS AGREEMENT, Made this....*sixth*....day of....*June*....A. D. ....*1914*....between....*Frank Ely*...., of....*Chicago, Illinois*...., and ....*James Hardy*...., of....*Chicago, Illinois*....:

WITNESSETH: WHEREAS, said....*Frank Ely is*....about to commence an action against....*Henry Jones*....for....*assault*....; AND WHEREAS, an action for....*assault*....has been brought against....*James Hardy*....by....*Henry Jones*....:

NOW, THEREFORE, ...*James Hardy*...., in consideration of ....*his*....interest in the suit brought by said....*Frank Ely*....and for ....*his*....own protection,....*agrees*....with....*Frank Ely*....to pay one-half of the costs and charges, including attorney's fee, of said suit of ....*Frank Ely*....against....*Henry Jones*...., such share to be apportioned after final judgment has been rendered in said suit.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

FRANK ELY.....[SEAL]
JAMES HARDY....[SEAL]

10. Agreement to Support Parents.

THIS AGREEMENT, Made this....*third*....day of....*August*....A. D. ...*1914*...between...*Frank Jones*..., of the...*City*...of...*Chicago*..., County of....*Cook*...., and State of....*Illinois*...., hereinafter called ....*Son*...., and....*Henry Jones*....and....*Mabel Jones*...., of....*the same place aforesaid*...., hereinafter called....*Parents*....:

WITNESSETH, In consideration of a payment made by the said ...*Parents*...to the said...*Son*..., after...*his*...majority, of various sums of money, totaling the amount of....*One Thousand* (*$1,000.00*)... Dollars, and in consideration of the transfer by said....*Parents*....to said ....*Son*....of a certain piece of real estate, described as follows, to wit: the....*Northwest One-Quarter* (¼)...., Section....*Four* (*4*)...., Township....*Twenty* (*20*) *North*...., Range....*Four*, *East*....of the ....*Third*....Principal Meridian, and in further consideration of the love and affection which said....*Son bears*....toward said....*Parents*....;

NOW, THEREFORE, said....*Son*....hereby....*agrees*....to provide a home for said....*Parents*....during....*their natural lives*....; said home shall consist of....*a house and lot*....not to exceed in cost....*Two Thousand* (*$2,000.00*)....Dollars, the same to be furnished by said....*Son*.... with all things to which said....*Parents were*....accustomed prior to this time, in....*their*....ordinary housekeeping; and it shall be the duty of said....*Son*....to keep said house in repair and in suitable and comfortable condition.

Said....*Son*....shall provide said....*Parents*....with....*an electric runabout*...., suitable room for said....*car*...., and shall pay for....*its upkeep*....during the lifetime of said....*Parents*....or for such time as ....*they*....may desire to use said....*car*....

IT IS FURTHER AGREED AND UNDERSTOOD that said....*Son*.... shall furnish said....*Parents*....with all necessary food and provisions, the same to be purchased wherever said....*Parents*....may choose; and the bills for the same to be rendered to said....*Son*.... But at no time shall said bills exceed....*Forty* (*$40.00*)....Dollars per month.

Said....*Son*....shall also provide light and heat such as may be necessary to produce reasonable comfort in the house heretofore described.

It shall be the duty of said....*Son*....at all times during the lifetime of said....*Parents, or either of them*...., to furnish such medical services as may be necessary for said....*Parents, or either of them*...., in case of sickness. And after the death of....*one of said Parents*...., said ....*Son*.... shall provide a companion for said....*other Parent*....

IT IS ALSO MUTUALLY AGREED that said....*Son*....shall carry out the provisions of this contract until the death of such....*Parents*...., whereupon....*he*....shall provide....*them*....with a decent burial and

erect a tombstone for....*each*....at a cost not to exceed....*Two Hundred* (*$200.00*)....Dollars. If said....*Son*....should become deceased before the death of said....*Parents, or either of them*...., said piece of real estate heretofore described shall vest in....*William Hardy*...., as Trustee, for the purpose of carrying out the terms of this agreement.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names the day and year first above written.

Witnesses:

....*WILLIAM HART*.... *FRANK JONES*....[SEAL]

....*HENRY WARD*..... *HENRY JONES*....[SEAL]

MABEL JONES....[SEAL]

.....[SEAL]

11. Agreement for Sale of Patent.

THIS AGREEMENT, Made this....*tenth*....day of....*July*....A. D. ...*1914*...between...*Oscar Jones*..., hereinafter called the...*vendor*..., and....*Herman Baker*....and....*James Smith*...., hereinafter called the ....*vendees*....:

WITNESSETH: WHEREAS, said....*vendor*....obtained letters patent of the United States, dated the....*third*....day of....*May*....A. D. ....*1904*...., and numbered....*2506*...., for an invention designated as ....*An Automobile Draught Closer*....,which said....*vendees desire*.... to buy,

NOW, IN CONSIDERATION of the sum of....*Two Hundred* (*$200.00*)....Dollars, said....*vendor agrees*....to sell absolutely to said ....*vendees*....all that said invention, patent, patent right, and all interests whatsoever of....*him*....the said....*vendor*....in and to the said invention and patent; together with all royalties, powers, and privileges whatsoever thereto belonging, or appertaining; and in confirmation of such sale the said....*vendees have*....upon the execution hereof, paid the sum of ....*Forty* (*$40.00*)....Dollars by way of deposit on and in part of the said purchase money; and the said....*vendor*....further....*agrees*.... that....*he*....will at any time hereafter, on payment of the remainder of said purchase money, and at the request of said....*vendees*...., execute an effectual transfer of said invention, patent, patent right, and interest unto said....*vendees*....or to such person or persons as....*they*....shall direct;

AND the said....*vendees*....further....*agree*....to pay the said purchase money to the said.....*vendor*.....on the.....*first*.....day of ....*August, next*...., on having a valid and effectual transfer of said patent, which is to be prepared by and procured at the expense of the said ....*vendor*....;

AND for the due performance of this contract, the....*parties bind themselves unto one another*....in the penal sum of....*One Hundred* (*$100.00*)....Dollars, which shall be recoverable as liquidated damages between them under and by virtue hereof if....*any party*....hereto shall fail to perform as herein agreed.

IN WITNESS WHEREOF, the said parties have hereunto set their hands the day and year first above written:

OSCAR JONES.....[SEAL]
HERMAN BAKER....[SEAL]
JAMES SMITH.....[SEAL]

12. Agreement for Sale of Personalty.

THIS AGREEMENT, Made and entered into this....*fourth*....day of ....*August*....A. D....*1914*....between....*John Ward*....of the County of....*Cook*....and State of....*Illinois, party*....of the first part, and ....*Herman Baker*....of....*the same County and State, party*....of the second part:

WITNESSETH, that the said....*party*....of the first part, in consideration of the sum of....*Three Hundred* (*$300.00*)....Dollars, to....*him*.... in hand paid, the receipt of which is hereby acknowledged, and in further consideration of the conveyance to...*him*...of the property hereinafter mentioned, ...*does agree*....on....*his*....part to sell, give and grant to said second....*party*....the following property, to wit:....*Five head of Jersey cows belonging to and kept by said party of the first part on his farm near Brookfield, Illinois, whose identity has been agreed on in the presence of the witnesses to this agreement*....

AND the said....*party*....of the second part, in consideration of the sum of....*Fifty* (*$50.00*)....Dollars, to....*him*....in hand paid, the receipt of which is hereby acknowledged, and in further consideration of the conveyance to....*him*....of the property above mentioned, ...*does agree*....on....*his*....part to sell, give and grant to said....*party*.... of the first part, the following property, to-wit:....*One black mare called Nellie, whose identity has likewise been agreed on in the presence of the witnesses to this agreement*....in exchange for the property to be received from the....*party*....of the first part.

IT IS MUTUALLY AGREED that.....*each party*.....hereto shall, at ....*his*....own cost and expense, deliver, each to....*the other*...., the property above agreed to be sold, and that such exchange shall take place and be performed on or before the....*sixth*....day of....*August*.... A. D....*1914*....

THE covenants and conditions of this agreement shall be binding upon the heirs, executors, administrators and assigns of the several parties hereto, respectively, and time shall be of the essence of this contract.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

JOHN WARD.....[SEAL]
HERMAN BAKER.....[SEAL]

Signed and Sealed in the Presence of
....*HARRY SMITH*....
....*HENRY KOCH*.....

13. Agreement for Sale of Realty.

THIS MEMORANDUM WITNESSETH, That....*Edward Black*.... *of*....*Savanna, Carroll County, Illinois*....hereby....*agrees*....to sell, and....*Frank Benner*....*of*....*Mount Carroll, Carroll County, Illinois, agrees*....to purchase at the price of....*Three Thousand* (*$3,000.00*).... Dollars, the following described real estate, situated in....*Carroll County, Illinois*....: ....*The Northwest* (*N. W.*) *One-Quarter* (¼)....Section ....*Two* (*2*)....in Township....*Four* (*4*) *North*...., Range....*One* (*1*) *East*....of the....*Third*....Principal Meridian. Subject to (1) existing leases expiring....*March first*....A. D.....*1916*...., the....*purchaser*.... to be entitled to the rents, if any, from the time of delivery of Deed; (2) all taxes and assessments levied after the year ....*1914*....; (3) any unpaid special taxes or assessments levied for improvements not yet made.

SAID....*purchaser has*....paid....*One Hundred* (*$100.00*)....Dollars, as earnest money, to be applied on said purchase when consummated, and ....*agrees*....to pay, within....*five*....days after the title has been examined and found good, the further sum of....*Nine Hundred* (*$900.00*).... Dollars, at the....*Carroll County Bank, Mount Carroll*....provided a good and sufficient....*Warranty*....Deed, conveying to said....*purchaser*....a good title to said premises (subject as aforesaid) shall then be ready for delivery. The balance to be paid as follows: ....*Two Thousand* (*$2,000.00*)....Dollars on....*March first*....A. D.....*1915*....with interest ....*after September first*....A. D.....*1914*....at the rate of....*five*.... per cent per annum, payable semi-annually, to be secured by notes and mortgage, or trust deed, of even date herewith, on said premises. A complete abstract of title, or merchantable copy, to be furnished within a reasonable time, with a continuation thereof brought down to this date. In case the title, upon examination, is found materially defective, within ten days after said abstract is furnished, then, unless the material defects be cured within sixty days after written notice thereof, the said earnest money shall be refunded and this contract become inoperative.

Should said....*purchaser*....fail to perform this contract promptly on ....*his*....part, at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the....*seller*...., be forfeited as liquidated damages, including commissions payable by....*seller*...., and this contract shall be and become null and void. Time is of the essence of this contract, and of all the conditions thereof.

THIS CONTRACT and earnest money shall be held by....*Carroll County Bank*....for the mutual benefit of the parties hereto.

IN TESTIMONY WHEREOF, said parties have hereunto set their hands, this....*fifth*....day of....*August*....A. D.....*1914*....

EDWARD BLACK.....[SEAL]
FRANK RENNER.....[SEAL]

Witnesses:
....*JOHN WILD*....
....*FRAZER WILLIAMS*....

14. Agreement for Purchase of Realty on Installment Plan.

THIS AGREEMENT, Made and entered into this....*seventh*....day of ....*July*....A. D.....*1914*...., between....*John Ward*....of the County of.....*Cook*...., State of....*Illinois, party*....of the first part, and ....*Richard Smith*...., of....*the same County and State, party*....of the second part:

WITNESSETH, That the....*party*....of the first part, in consideration of the sum of....*Two Hundred* (*$200.00*)....Dollars, to....*him*....duly paid, hereby....*agrees*....to sell unto the....*party*....of the second part, the following described land, situated in the County of....*Cook*....and State of....*Illinois*...., to-wit: Lot....*Five* (*5*)....in Block....*Two* (*2*)...., of...*Piper's Addition*....to the....*City*....of....*La Grange*...., State of....*Illinois*....

The said....*party*....of the first part to furnish said....*party*....of the second part a full and complete merchantable abstract of title to said property on the delivery of these presents.

AND the said....*party*....of the second part hereby....*agrees*....to pay to the said....*party*.... of the first part the said sum of....*Two Hundred* (*$200.00*).....Dollars, in equal monthly installments of.....*Forty* (*$40.00*)....Dollars each, in advance on the first day of each and every month, successively, after this day, until the whole of said first mentioned sum is fully paid.

And when said sum is fully paid, according to the tenor and effect of this agreement, the....*party*....of the first part shall, at once and immediately, at....*his*....own proper cost and expense, execute and deliver to the said ....*party*....of the second part, a proper deed of warranty conveying the said above described lot in fee simple, free and clear from all encumbrances, and right of dower or homestead.

IT IS AGREED, that the stipulations and terms of this agreement shall extend to and be binding on the heirs, executors, administrators and assigns of the parties hereto, and that time shall be of the essence of this contract.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals, the day and year first above written:

JOHN WARD.....[SEAL]
RICHARD SMITH.....[SEAL]

Sealed and Delivered in the Presence of
....*FRANK BROWN*....

15. Agreement for Renewal of Loan.

WHEREAS, On the....*twentieth*....day of....*May*....A.D....*1911*.... a loan of the sum of....*Two Hundred* (*$200.00*)....Dollars was made to ....*Frank Smith*....of....*Glencoe, Cook*....County, ...*Illinois*...., evidenced by the....*one*....principal promissory note of the said....*Frank Smith*....dated....*May Twentieth*....A. D.....*1911*....for....*Two Hundred* (*$200.00*)....Dollars, payable to....*Richard Ely*....or....*his*....

order....*three*....years after....*its due*....date, with interest at the rate of....*five*....per cent per annum, payable....*semi-annually*....and both principal and interest payable at the....*State Bank of Evanston*....the payment of which said....*note*....and interest was secured by a Trust Deed of even date therewith, executed by said....*Frank Smith*....conveying to....*State Bank of Evanston*....as Trustee, certain Real Estate in ....*Glencoe*....which said Trust Deed was recorded in the Recorder's Office of....*Cook*....County, ...*Illinois*....on the....*tenth*....day of ....*May*....A. D.....*1911*...., in Book....*Two*....of.....*Recorder's Records*....at page....*219*....

AND WHEREAS, the said....*one*....principal note....*has*....become due and....*is*....now owned and held by....*Richard Ely*...., and said ....*Frank Smith has*....requested of said....*Richard Ely*....an extension of the time of payment thereof;

NOW, THESE PRESENTS, Dated this....*first*....day of....*May*.... A. D....*1914*....made between the said....*Frank Smith*....and the said....*Richard Ely*....witness: That in consideration of the mutual promises and agreements hereinafter made by and between the parties hereto aforesaid, the said parties do hereby mutually promise and agree as follows, to-wit: the said....*Richard Ely agrees*....with the said...*Frank Smith*... that the time of payment of said principal....*note*....be, and the same is hereby extended, for a period of....*two*....years from the....*twentieth*.... day of....*May*....A. D.....*1914*...., to-wit: until the....*twentieth*.... day of.....*May*.....A. D.....*1916*....., and the said.....*Frank Smith agrees*....with the said....*Richard Ely*....that....*he*....will pay to said ....*Richard Ely*....the said principal sum of....*Two Hundred* (*$200.00*).... Dollars, in said principal....*note*....mentioned, on the...*twentieth*.... day of....*May*....A. D....*1916*...., with interest thereon from the ....*twentieth*....day of....*May*....A. D.....*1914*...., until paid, at the rate of....*five*....per cent per annum, payable....*semi-annually*...., on the....*twentieth*....day of....*May*...., and of....*November*....in each year, and both principal and interest payable at the....*State Bank of Evanston*....

And said parties hereto further mutually agree, that all of the provisions, stipulations, powers and covenants in the said principal....*note*...., and in the said Trust Deed contained, shall stand and remain unchanged and in full force and effect for and during said extended period (including the right of election to the holder of said principal....*note*....to make the principal due on thirty days' default in payment of interest).

The interest for said extended period is further evidenced by....*four*.... interest notes, made by said....*Frank Smith*....of even date herewith, for....*Five* (*$5.00*)....Dollars each.

The agreements herein contained shall bind and enure to the respective heirs, executors, administrators and assigns of the said parties hereto.

IN WITNESS WHEREOF, the said....*Frank Smith*....and the said ....*Richard Ely*....have hereunto set their hands in duplicate.

FRANK SMITH.....[SEAL]
RICHARD ELY.....[SEAL]

B. Assignments.

16. Assignment of an Account.

KNOW ALL MEN BY THESE PRESENTS, that....*I, Henry Bennett*....of....*Troy, New York*..., in consideration of...*Forty* (*$40.00*)... Dollars, lawful money of the United States to....*me*....paid before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer, and set over unto....*Albert Zuck*....of....*Troy, New York, his*....executors, administrators, and assigns, to....*his*....or their own proper use and benefit all....*my*....right, title, and interest in and to any and all sum or sums of money now due or to grow due upon the annexed account, or upon the sales, or services, or loans, or whatever transactions may be the basis of the account therein mentioned. And....*I*....do hereby give the said....*Albert Zuck, his*....executors, administrators, and assigns, the full power and authority, for....*his*....or their own use and benefit, but at....*his*....or their own cost, to ask, demand, collect, receive, compound, and give acquittance for the same, or any part thereof, and in ....*my*....name or otherwise to prosecute and withdraw any suits or proceedings at law or in equity therefor.

IN WITNESS WHEREOF, ...*I*....have hereunto set....*my*....hand and seal, this....*third*....day of....*June*....A. D.....*1914*....

In the Presence of *HENRY BENNETT*....[SEAL]

....*OSCAR WILLIAMS*....

....*JOHN HILL*....

17. Assignment for Benefit of Creditors.

THIS INDENTURE, Made and entered into this.....*tenth*.....day of ....*August*....A. D.....*1914*....by and between....*William Ward*....of ....*Oak Park*...., in the County of....*Cook*....and State of....*Illinois, party*..... of the first part, and.....*Fred Williams*.....of.....*Chicago*...., in the County of....*Cook*....and State of....*Illinois, party*.... of the second part:

WITNESSETH: WHEREAS, the said....*party*....of the first part is indebted to divers persons in divers sums of money, as is more particularly enumerated and set forth in a list hereto annexed, marked Schedule "A," and made a part hereof; and

WHEREAS, the said...*William Ward, party*...of the first part, ...*has*... become and.....*is*.....at present unable to pay said indebtedness, and ....*is*....desirous of providing for the payment thereof by an assignment of all....*his*....property and effects (except such as may be exempt to ....*him*....by the laws of the State of....*Illinois*....), for that purpose, as provided by an act of the General Assembly of the State of....*Illinois*...., entitled "An Act concerning Voluntary Assignments, and conferring jurisdiction therein upon County Courts," approved May 22, 1877, in force July 1, 1877;

NOW, THIS INDENTURE WITNESSETH, That the said....*party*.... of the first part, in consideration of the premises, and in consideration of one

dollar, in hand paid by the said....*party*....of the second part, the receipt whereof is hereby acknowledged, ...*has*,...granted, bargained, sold, assigned, transferred and set over, and by these presents....*does*....grant, bargain, sell, assign, transfer and set over to the said....*party*....of the second part, and....*his*....successors in trust, all and singular, the lands, tenements, hereditaments and appurtenances, goods, chattels, accounts, promissory notes, bonds, bills, debts, choses in action, claims, demands, property and effects of every kind and description, real, personal and mixed, belonging to the said....*party*....of the first part, or in which....*he has*....any right or interest, or which are held by any person or persons for....*him*...., or in trust for....*him*...., (except such as is exempt from levy and sale under execution, under the laws of the State of....*Illinois*....), the same being fully and particularly enumerated and described in an inventory, under the oath of said....*party*....of the first part, hereto annexed, marked Schedule "B," and made a part hereof; also the books of account of said ....*party*....of the first part, and all papers, documents and vouchers relating to....*his*....business, dealings, property or affairs;

TO HAVE AND TO HOLD the same, and each and every part or parcel thereof, unto the said....*party*....of the second part, ...*his*....successors and assigns, IN TRUST, NEVERTHELESS, and to and for the uses, interests and purposes following, that is to say:

THE said....*party*....of the second part shall take possession of the property hereby assigned, or intended so to be, and shall, with all convenient diligence, proceed to sell and dispose of the same, as is provided in said Act concerning Voluntary Assignments, and convert the same into money, and shall, also, with all reasonable diligence, collect and receive all and singular, the debts, dues, bills, bonds, notes, accounts, and balances of accounts, judgments, securities, claims and demands hereby assigned, and out of the proceeds of said sales and collections make such payment or payments to the creditors of the said....*party*....of the first part, as shall from time to time be directed to be made by the County Court, as provided in the Act aforesaid, and if, after the payment of all costs, charges and expenses attending the execution of the trust hereby created, and the payment and discharge in full of all lawful debts due and owing by the said ....*party*....of the first part, of every kind and description that may have been proved against....*him*...., as provided in said Act, any part or portion of the proceeds of said sales and collections shall remain in the hands or control of the said.....*party*.....of the second part, or.....*his*..... successors in trust, ...*he*....shall return the same to the said....*party*.... of the first part, ...*his*....heirs, executors and administrators; and if, after payment in full as aforesaid, there should remain in the hands or possession of said....*party*.... of the second part, or....*his*....successors in trust, any part or portion of the property or effects hereby assigned, which shall not have been sold, collected, or converted into money, ...*he*.... shall return, re-assign and re-deliver the same to the said....*party*....of the first part, ...*his*....heirs, executors and administrators, by proper, full and complete instruments of re-conveyance or re-assignment.

AND in furtherance of the premises, the said....*party*....of the first

part....*does*....hereby make, constitute and appoint the said....*party*.... of the second part....*his*....true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in said premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons, all property, debts and demands due, owing and belonging to the said ....*party*....of the first part, and to give acquittances and discharges for the same, to sue, prosecute, defend and implead for the same, and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances. And the said....*party*....of the first part....*does*....hereby authorize the said....*party*....of the second part to sign the....*name*....of the said ....*party*....of the first part to any check, draft, promissory note, or other instrument in writing, which is payable to the order of the said....*party*.... of the first part, or to sign the....*name*....of the....*party*....of the first part to any instrument in writing whenever it shall be necessary so to do to carry into effect the object, design and purpose of this trust.

THE said....*party*....of the second part....*doth*....hereby accept the trust created and reposed in....*him*....by this instrument, and....*doth*.... covenant and agree to and with the said....*party*....of the first part, that ....*he*....will faithfully and without delay execute the trust hereby created according to the best of....*his*....knowledge, skill and ability.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

WILLIAM WARD.....[SEAL]
FRED WILLIAMS.....[SEAL]

STATE OF....*ILLINOIS*....}
County of.....*Cook*.....} ss.

I, ...*Henry Towner*...., a....*Notary Public*....in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that....*William Ward and Fred Williams*...., personally known to me to be the same ....*persons*....whose....*names are*....subscribed to the foregoing instrument, appeared before me this day, in person, and acknowledged that ....*they*....signed, sealed and delivered the said instrument as....*their*.... free and voluntary act and deed, for the uses and purposes therein set forth.

GIVEN under my hand and....*notarial*....seal, this....*tenth*....day of....*August*....A. D.....*1914*.... *HENRY TOWNER*....
[NOTARIAL SEAL] NOTARY PUBLIC.

NOTE. A shorter acknowledgment frequently used where the instrument is not to be sent out of the jurisdiction is as follows:

STATE OF....*ILLINOIS*....}
County of.....*Cook*.....} ss.

Subscribed and sworn to before me, this....*tenth*....day of....*August*....A. D....*1914*.... *HENRY TOWNER*....
[NOTARIAL SEAL] NOTARY PUBLIC.

NOTE. In addition to notaries, commissioners and justices of peace are authorized in some states to take acknowledgments. Clerks of the court are usually authorized to take acknowledgments on court forms.

18. Assignment of Judgment.

THIS INDENTURE, Made the....*ninth*....day of.....*May*.....A. D. ....*1914*....between....*John C. Wagner, party*....of the first part, and ....*Herman Johnson, party*....of the second part:

WITNESSETH, WHEREAS, the said....*party*....of the first part, on the....*third*....day of....*April*....A. D.....*1914*...., recovered a Judgment in the....*Municipal Court of Chicago*....against....*William Short*.... for....*Five Hundred* (*$500.00*)....Dollars, and costs of suit, as will by the record thereof more fully appear.

ALSO, THIS INDENTURE WITNESSETH, That the said....*party*.... of the first part, in consideration of....*Four Hundred* (*$400.00*)....Dollars, to....*him*....duly paid, before the sealing and delivery of these Presents (the receipt whereof is hereby acknowledged), ...*has*....sold, assigned, transferred, and set over, and, by these Presents, ...*does*....sell, assign, transfer, and set over unto the said....*party*....of the second part, and....*his*....assigns, the said Judgment, and any or all sum or sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon.

AND the said....*party*....of the first part....*does*....hereby constitute and appoint the said....*party*....of the second part, and....*his*.... executors, administrators, and assigns, ...*his*....true and lawful attorney, irrevocable, with power of substitution and revocation, for....*him*....and in....*his*....name, and in the name or names of....*his*....executors and administrators, but for the sole use and benefit of the said....*party*....of the second part, and at....*his*....own costs and charges, to ask, demand, and receive, and to sue out executions, and other writs, and take all lawful ways for the recovery of the money due, or to become due, on the said Judgment, and, on payment, to acknowledge satisfaction, or discharge the same: And attorneys, one or more, under....*him*....for the purpose aforesaid, to make and substitute, and the same, at pleasure, again to revoke: hereby ratifying and confirming all that....*his*....said attorney, or substitute, shall lawfully do in the premises.

AND the said....*party*....of the first part....*does*....covenant that there is now due on the said Judgment the sum of....*Five Hundred Ten* (*$510.00*)....Dollars, and that....*he*....will not collect or receive the same, or any part thereof, nor release or discharge the said Judgment, but will own and allow all lawful proceedings therein, the said....*party*....of the second part saving the said....*party*....of the first part harmless of and from any costs and charges in the premises.

JOHN C. WAGNER.....[SEAL]
HERMAN JOHNSON.....[SEAL]

Sealed and Delivered in the Presence of

....*HERMAN GILBERT*....
....*CHARLES JONES*....

NOTE. A properly authorized officer's acknowledgment of at least signature of party of the first part should accompany. See No. 17.

19. Assignment of Lease.

KNOW ALL MEN BY THESE PRESENTS, That....*I, Peter Jones*...., of....*Albany, New York*...., in consideration of....*One Hundred* (*$100.00*)....Dollars, lawful money of the United States, to....*me*....in hand paid, the receipt whereof is hereby acknowledged, have sold, assigned, transferred, and set over, and by these present do sell, assign, transfer, and set over unto....*Henry Rowe*...., of....*Albany, his*....executors, administrators, and assigns, to....*his*....or their own proper use and benefit, all ....*my*....right, title, and interest in....*a certain lease*....bearing date the....*fourth*....day of....*May*....A. D.....*1912*...., made by....*John Doe*...., of....*Albany*...., to....*me*...., the said....*Peter Jones*...., of ....*a certain dwelling-house and lot*...., situate at....*124 Park Avenue, Albany, New York*...., with all and singular the premises therein mentioned and described, and the buildings thereon, together with the appurtenances; to have and to hold the same unto the said....*Henry Rowe, his*....heirs, executors, administrators, and assigns, from the....*fifth*.... day of....*May, next*...., for and during all the rest, residue, and remainder of the term of....*four*....years mentioned in the said indenture of lease; subject, nevertheless, to the rents, covenants, conditions, and provisions therein also mentioned.

AND....*I*....do hereby covenant and agree to and with the said ....*Henry Rowe*....that the said assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments and encumbrances whatsoever.

WITNESS....*my hand and seal*...., this....*third*....day of....*April*.... A. D....*1914*....

Witness:

....*WILLIAM HENRY*.... *PETER JONES*....[SEAL]

20. Assignment of Mortgage.

KNOW ALL MEN BY THESE PRESENTS, That....*Albert Koch, Albion, Illinois*...., the....*party*....of the first part, in consideration of the sum of....*Three Hundred* (*$300.00*)....Dollars, lawful money of the United States of America, to....*him*....in hand paid by....*William Black*...., the....*party*....of the second part, at or before the ensealing and delivery of these Presents, the receipt whereof is hereby acknowledged, ...*has*....granted, bargained, sold, assigned, transferred, and set over, and, by these Presents, ...*does*....grant, bargain, sell, assign, transfer, and set over unto the said....*party*....of the second part, ...*his*....heirs, executors, administrators, and assigns, a certain INDENTURE OF MORTGAGE, bearing date the....*seventh*....day of....*April*....A. D.....*1912*...., made by...*Henry Jones, Shannon, Illinois*..., and conveying all...*his*... right, title, and interest to the premises therein described, as follows, to wit: ....*The Southwest One Quarter* (¼)....of Section....*Two*

(*2*)...., Township....*Three* (*3*)...., Range....*One* (*1*), *East*....of the....*Third*....P. M., which said Mortgage is recorded in the Recorder's Office of the County of....*Will*....in the State of....*Illinois*....in Book No.....*7*....of Mortgages, at page....*253*....

TOGETHER with the....*premises*....therein described, and the money due or to grow due thereon, with the interest, TO HAVE AND TO HOLD the same unto the said....*party*....of the second part, ...*his*....executors, administrators, or assigns, FOREVER, subject only to the provisos in the said Indenture of Mortgage contained:

AND said....*party*....of the first part....*does*....for....*his*....heirs, executors, and administrators, covenant with the said....*party*....of the second part, ...*his*....heirs, executors, administrators, and assigns, that there is now actually due and owing on said....*note*....and Mortgage, in principal and interest, ...*Three Hundred Nine* (*$309.00*)....Dollars, and that....*he has*....good right to assign the same:

AND....*he does*....hereby make, constitute, and appoint the said ....*party*....of the second part, ...*his*....true and lawful attorney, irrevocably, in....*his*....name, or otherwise, but at....*his*....own proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the said money and interest, and, in case of payment, to discharge the same as fully as....*he*....might, or could do, if these Presents were not made.

IN WITNESS WHEREOF, ...*he has*....hereunto set....*his hand and seal*...., this....*fourth*....day of....*June*....A. D.....*1914*....

ALBERT KOCH....[SEAL]

Sealed and Delivered in the Presence of

....*JOHN HOFFMAN*....

Accepted:

....*WILLIAM BLACK*....[SEAL]

NOTE. Affidavit before authorized official should accompany. See No. 17.

21. Assignment of Patent Before Issuance of Letters.

WHEREAS, ...*I, Henry Clark*...., of....*Middletown*...., in the County of....*Whiteside*...., State of....*Iowa*...., have invented a certain new and useful....*Improvement in the Manufacture of Automobiles*...., to wit:....*A Speedometer*...., for which....*I am*....about to make application for letters patent of the United States;

AND WHEREAS, ...*John Ward*...., of....*the same County and State, is*....desirous of acquiring an interest in said invention, and in the letters patent to be obtained therefor:

NOW, THEREFORE, TO ALL WHOM IT MAY CONCERN, be it known that for and in consideration of the sum of....*One Hundred* (*$100.00*)....Dollars, to....*me*....in hand paid, the receipt of which is hereby acknowledged, ...*I*...., the said....*Henry Clark*...., have sold, assigned and transferred, and by these presents do sell, assign and transfer

unto the said....*John Ward*....the full and exclusive right to said invention, as fully set forth and described in the specification prepared and executed by....*me*....on the....*fourth*....day of....*April*....A. D. ....*1914*...., preparatory to obtaining letters patent of the United States, therefor; and....*I*....do hereby authorize and request the Commissioner of Patents to issue the said letters patent to the said....*purchaser*....or ....*his*....assignees, of....*my*....entire right, title, and interest in and to the same, for the sole use and behoof of the said....*purchaser*....and ....*his*....legal representatives.

IN TESTIMONY WHEREOF, ...*I*....have hereunto set....*my hand*.... and affixed....*my seal*....this....*fifteenth*....day of....*July*....A. D. ....*1914*....

HENRY CLARK....[SEAL]

NOTE. Authorized official's acknowledgment should accompany. See No. 17.

22. Assignment of Patent After Issuance of Letters.

WHEREAS, ...*I, Henry Clark*...., of....*Middletown*...., County of ....*Whiteside*...., State of....*Iowa*...., did obtain letters patent of the United States for....*an Improvement in Washing Machines*...., which letters patent are numbered....*233222*....and bear the date of the ....*ninth*....day of....*May*....A. D.....*1912*....; AND WHEREAS, ...*I am*....now the sole owner of said patent, and of all rights under the same in the below recited territory; AND WHEREAS, ...*John Ward*...., of....*Middletown*...., County of....*Whiteside*...., State of ....*Iowa, is*....desirous of acquiring an interest in the same:

NOW, THEREFORE, TO ALL WHOM IT MAY CONCERN, be it known that for and in consideration of the sum of....*Two Hundred* (*$200.00*)....Dollars to....*me*....in hand paid, the receipt of which is hereby acknowledged, ...*I*...., the said....*Henry Clark*...., have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto the said....*John Ward*...., all the right, title and interest in and to the said invention as accrued to....*me*....by said letters patent, for, to, and in the State of....*Iowa*...., and for, to, or in no other place or places; the same to be held and enjoyed by the said....*John Ward*.... in all and throughout the above specified territory but not elsewhere, for ....*his*....own use and behoof, and for the use and behoof of....*his*.... legal representatives, to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by....*me*....had this assignment and sale not been made.

IN TESTIMONY WHEREOF, ...*I*....have hereunto set....*my hand and seal*...., this....*fourth*....day of....*August*....A. D.....*1914*....

HENRY CLARK....[SEAL]

NOTE. Acknowledgment before authorized official should accompany. See No. 17.

23. Assignment of Wages Due and to Become Due.

KNOW ALL MEN BY THESE PRESENTS, That....*I, Henry Smoot*...., of....*Chicago, Illinois*...., in consideration of....*Forty* (*$40.00*)....Dollars, lawful money of the United States, to....*me*....paid before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have sold, assigned, and set over and by these presents do sell, assign, transfer and set over unto....*Frank Rowe*...., of....*Chicago, Illinois, his*.... executors, administrators and assigns, to....*his*....and their own proper use and benefit, all....*my*....right, title, and interest in and to any or all sum or sums of money now due or to become due to....*me*....from the ....*Michigan Central Railroad Company*....as....*Conductor on the trains of said company*....between the date hereafter affixed and the....*tenth*.... day of....*November*....A. D....*1914*...., and....*I*....do hereby give the said....*Frank Rowe, his*....executors, administrators and assigns the full power and authority to ask, demand, collect, receive, compound, and give a quittance for the same, or any part thereof, and in....*my*....name or otherwise, but at....*his*....or their own cost, to prosecute and withdraw any suits or proceedings at law or in equity therefor and do all other things touching the premises in like manner to all intents and purposes as....*I*.... could, acting in....*my*....own behalf.

IN WITNESS WHEREOF, ...*I*....hereunto set....*my hand and seal*....this....*tenth*....day of....*August*....A. D.....*1914*....

Witnesses:

....*FRANK WARD*..... *HENRY SMOOT*....[SEAL]

....*SAMUEL DAVIS*....

NOTE. Acknowledgment before authorized official should be added. See No. 17.

C. Bills and Notes.

24. Bill of Lading.

THE CHICAGO & AKRON RAILROAD COMPANY.
BILL OF LADING.

Shippers No. ....*24125*....
Agents No. .....*14051*....

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at....*Lincoln, Illinois, August sixth*....A. D....*1914*...., from....*James Brady*...., the property described below, in apparent good order, unless noted otherwise (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of

said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the....*shipper*.... and accepted for....*himself*....and....*his*....assigns.

The rate of freight from....*Lincoln, Illinois*....to....*Chicago, Illinois*....is....*40*....cents per 100 lbs.

Consigned to....*Harding Commission Company*....Destination....*14 W. South Water Street*....State of.....*Illinois*.....County of.....*Cook*..... Route....*Direct*....Car Initial....*D*....Car No....*1121*....

Article....*100 sacks of potatoes*....weight....*3,000 lbs*....Class ....*3d*....Charges....*prepaid*....

....*JAMES BRADY*.... *H. W. ADAMS*....

SHIPPER AGENT

Per....*WILLIAM JAMES*....

(The conditions before mentioned as appearing on the back of the bill are here omitted. These conditions are uniform and comply with the rules of the Interstate Commerce Commission.)

25. Certificate of Protest.

STATE OF....*NEW JERSEY*....
County of.....*Newark*..... } ss.

BE IT KNOWN, that on this....*third*....day of....*May*....A. D. ....*1914*...., I, ...*Bert May*...., a notary public, duly commissioned and sworn, and residing in the....*City of Newark*...., in said County and State, at the request of....*Ralph Day*....went, with the original....*note*...., which is above attached, to the office of....*John Hay*....and demanded ....*payment*....thereon, which was refused by said....*John Hay*....

WHEREUPON I, the said notary, at the request of the aforesaid, did protest, and, by these Presents, do solemnly protest, as well against the ....*maker*....of said....*note*...., the endorsers thereof, as all others whom it may or doth concern, for exchange, re-exchange, and all costs, damages, and interest already incurred by reason of the....*non-payment*....of said ....*note*....

AND I, the said notary, do hereby certify, that, on the same day and year above written, and within forty-eight hours from the time of such protest, due notice of the foregoing protest was put in the postoffice at....*Newark. New Jersey*...., as follows:

Notice for....*John Hay, 212 W. Adams St., Newark, N. J*....

Notice for....*Henry Hawk, 313 N. Poplar St., Newark, N. J*....

Notice for....*Albert Wolf, 132 W. Hayes St., Newark, N. J*....

Each of the above named places being the reputed place of residence of the person to whom this notice was directed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year first above written.

BERT MAY....,
NOTARY PUBLIC

26. Check.

Evanston, Ill., June 23, 1914....No....*X24*....

STATE BANK OF EVANSTON

Pay to the order of

....*Albert Perkins*.... ....*$25.00*....

....*Twenty-five and 00/100*....Dollars

Payable through Chicago Clearing House. *WILLIAM ROE*....

27. Draft.

No....*21*.... $....*100.00*.... *Chicago, June 1, 1914*....

....*Three months*....after date pay to the order of....*Thomas Smith*

One Hundred....Dollars, value received, and charge to the account of

To....*BROWN BROS*.... *N. A. JONES*....

....*Peterson, Va*....

28. Foreign Bill.

Chicago, June 1, 1914....

No....*23*.... Exchange of £....*100*....

....*Six months*....after sight of this first of exchange (second and third unpaid), pay to the order of....*Mr. Don Carlos, One Hundred Pounds*...., value received, and charge the same to account of....*James Smith*.... against your letter of credit No....*1*....

To....*S. JACKSON CO*.... *JAMES RENNER*....

....*London, England*....

29. Judgment Note.

$....*200.00*.... *Chicago, Ill., June 3, 1914*....

....*Three months*....after date, WITHOUT GRACE, for value received, ...*we*....promise to pay to the order of....*James Ward, Two Hundred*.... Dollars, at....*First National Bank of Chicago*...., with interest payable monthly at....*six*....per cent per annum after date until maturity, and ....*seven*....per cent per annum after maturity until paid.

And to secure the payment of said amount....*we*....hereby authorize, irrevocably, any attorney of any Court of Record to appear for....*us*....in such Court, in term time or vacation, at any time hereafter, and confess a judgment without process, in favor of the holder of this Note, for such amount as may appear to be unpaid thereon, and....*Twenty*....Dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and to consent to immediate execution upon such judgment, hereby ratifying and confirming all that..... said attorney may do by virtue hereof.

No....*12*....

ALFRED WARNER....

JOHN PEACOCK.....

30. Promissory Note.

$....*300.00*.... *New York, July 30, 1914*....

....*Four years*....after date....*I*....promise to pay....*John Doe*...., or order, ...*Three Hundred*....Dollars, with....*six*....per cent interest per annum, for value received. *THOMAS PEABODY*....

No....*5*....

31. Receipt.

$....*300.00*....

Received, ...*Chicago, July 1, 1914*....., of.....*Thomas Smith, Three Hundred*....Dollars, in full of account. *THOMAS ALBERTSON*....

D. Bills of Sale.

32. Bill of Sale of Personalty.

KNOW ALL MEN BY THESE PRESENTS, That....*I, Frank Johnson*...., of the....*City of Rockford*....in the County of....*Winnebago*.... and State of....*Illinois, party*....of the first part, for and in consideration of the sum of....*Seven Hundred* (*$700.00*)....Dollars, lawful money of the United States of America, to....*me*....in hand paid, at or before the ensealing and delivery of these Presents, by....*Anton Piotrowski, party*.... of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and delivered, and, by these Presents, do grant, bargain, sell, and deliver, unto the said....*party*....of the second part, all of the following GOODS, CHATTELS, and PROPERTY, to wit:....*All the fixtures in my store at the corner of Poplar and Grove Streets in the City of Rockford, Illinois*....,

TO HAVE AND TO HOLD the said goods, chattels, and property unto the said....*party*....of the second part, ...*his*....heirs, executors, administrators, and assigns, to and for....*his*....and their own proper use and behoof, forever.

AND....*I*....the said....*party*....of the first part, do vouch....*myself*....to be the true and lawful....*owner*....of the said goods, chattels, and property, and have in....*myself*....full power, good right, and lawful authority, to dispose of the said goods, chattels, and property, in manner, as aforesaid: And....*I*....do for....*my*.... heirs, executors, and administrators, covenant and agree to and with the said....*party*....of the second part, to WARRANT AND DEFEND the said goods, chattels, and property to the said....*party*....of the second part, ...*his*....executors, administrators, and assigns, against the lawful claims and demands of all and every person and persons whomsoever.

IN WITNESS WHEREOF, ...*I*....have hereunto set....*my hand and seal*...., the....*fourth*....day of....*May*....A. D.....*1914*....

FRANK JOHNSON....[SEAL]

Sealed and Delivered in the Presence of

....*WILLIAM HENRY*....

NOTE. Add acknowledgment before authorized official. See No. 17.

E. Bonds.

33. Contractor's Bond.

KNOW ALL MEN BY THESE PRESENTS, That.....*we, Edward Ryan*....and....*John Condon,* ....of the....*City*....of....*Wilmette*.... in the County of....*Cook*....and State of....*Illinois, are*....held and firmly bound unto....*Louis Fry*....of the....*City*....of....*Wilmette*...., County of....*Cook*....in the State of....*Illinois*...., and to....*his*.... heirs, executors, administrators and assigns, in the penal sum of....*Seven Hundred* (*$700.00*)....Dollars, lawful money of the United States, for the payment of which sum, well and truly to be made, ...*we*....bind....*ourselves, our*....heirs, executors, and administrators, jointly, severally, and firmly, by these Presents.

WITNESS.....*our hands and seals*...., this.....*seventh*.....day of ....*May*....A. D....*1914*....

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH That, WHEREAS, the above bounden....*Edward Ryan*....has this day made and entered into a contract with the said....*Louis Fry*....to build for the said ....*Louis Fry*....a certain....*three-story brick house*....to be erected on Lot....*Three* (*3*)....Block....*Seven* (*7*)....in....*Powell's Subdivision*.....to the.....*Village*.....of.....*Wilmette*....., in the County of ....*Cook*....and State of....*Illinois*...., according to certain plans and specifications heretofore agreed upon between the said parties to said contract, said building to be fully completed and finished on or before the ....*fourth*....day of....*October*....A. D....*1915*...., the same to be built under the direction of....*John Kelly*...., architect.

NOW, THEREFORE, if the above bounden....*Edward Ryan*....shall well and truly perform and fulfill all the covenants and agreements by ....*him*....made in said contract for the erection and completion of said building, to be performed and fulfilled as therein set forth, and according to the written approval of the said....*John Kelly*...., architect, and will save and keep harmless the said....*Louis Fry*....and the said building and the land on which the same is erected, from all and every claim for liens for materials, labor, or otherwise, incurred by reason of the erection or completion of said building, and shall turn over the said building to the said....*Louis Fry*....free and clear from all liens or claims for materials or for labor, then this obligation to be void, otherwise to remain in full force and virtue.

EDWARD RYAN.....[SEAL]
JOHN CONDON.....[SEAL]

Sealed and Delivered in the Presence of

....*ROY WILLIAMS*....
....*BERT GRAY*.....

NOTE. Acknowledgment before authorized official is frequently used instead of or in addition to witnesses. See No. 17.

34. Corporate Officer's Bond.

KNOW ALL MEN BY THESE PRESENTS, That...*we, John Walker*... of....*Chicago, Illinois*...., as principal, and....*Henry Moll*....of....*Wilmette, Illinois*....and....*Jerry Myers*....of.....*Evanston, Illinois*.....as ....*sureties, are*....held and firmly bound unto....*Frank Simpson*....of ....*Rockford, Illinois*...., and to....*his*....heirs, executors, administrators and assigns, in the penal sum of....*Six Hundred* (*$600.00*)....Dollars, lawful money of the United States, for the payment of which sum, well and truly to be made, ...*we*....bind....*ourselves, our*....heirs, executors and administrators, jointly, severally, and firmly, by these Presents.

WITNESS....*our hands and seals*...., this....*third*....day of....*July*.... A. D....*1914*....

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH That, WHEREAS, the above bounden....*John Walker*....was on the ....*third*....day of....*July*....A. D....*1914*....duly.....*elected*.... to the office of....*Treasurer*....of....*The Manhattan Lumber Company, a corporation*...., for the....*fiscal*....year ending....*July thirtieth*....A. D. ....*1915*...., and is about to assume the duties of said office; now if the said....*John Walker*....shall well and truly perform the duties of said office of....*Treasurer*....during his term of office, and shall safely keep and truly account for all moneys, goods and chattels and other things coming to his hands as such....*Treasurer*....during his term of office, and at the expiration of his term of office, shall pay over to his successor in office, or to any other person duly authorized by said....*corporation*....to receive the same, all moneys, goods and chattels and other things received by him as such ....*Treasurer*....and not otherwise lawfully paid out, and shall deliver to his successor in office, or other person appointed to receive the same, all property, books, papers and other things in his hands belonging to said office, and shall, at the expiration of his term of office, or oftener if thereunto requested by the said....*corporation*...., render a just and true account of his doings as such....*Treasurer*....then this obligation to be void, otherwise to remain in full force, effect and virtue.

JOHN WALKER....[SEAL]
HENRY MOLL.....[SEAL]
JERRY MYERS.....[SEAL]

Approved this....*fifth*....day of....*July*....A. D....*1914*....
ALBERT WEBER .....
[CORPORATE SEAL] *President The Manhattan Lumber Company*....

NOTE. For witnesses or acknowledgment, see No. 33.

35. Bond for Deed.

KNOW ALL MEN BY THESE PRESENTS, That.....*we, Joseph Brown*....and....*Harry Parke*...., of the County of....*Kane*....and State of....*Illinois, are*....held and firmly bound unto....*Charles Lane*...., of the....*City*....of....*Momence*...., County of....*Du Page*...., in the

State of....*Illinois*...., and to....*his*....heirs, executors, administrators and assigns, in the penal sum of....*Four Hundred* (*$400.00*)....Dollars, lawful money of the United States, for the payment of which sum, well and truly to be made, ...*we*....bind....*ourselves, our*....heirs, executors and administrators, jointly, severally, and firmly, by these Presents.

WITNESS....*our hands and seals*...., this....*third*....day of....*July*.... A. D....*1914*....

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH That, WHEREAS, the above bounden....*Joseph Brown*....and....*Harry Parke have*....this day sold to the said....*Charles Lane, his*....heirs and assigns, for the sum of....*Three Hundred* (*$300.00*)....Dollars, all the following described lot or parcel of land, to wit: Lot ....*Five* (*5*), *Parker's Subdivision*....to the....*City*....of....*Momence, Illinois*...., which sum of ....*Three Hundred* (*$300.00*)....Dollars is to be paid on or before ....*October first*....A. D.....*1914*...., with interest at the rate of ....*six*....per cent until paid.

UPON the payment of said sum at the time and in the manner aforesaid, and of all taxes, assessments or impositions that may be legally levied or imposed upon said....*lot*....subsequent to....*July third*....A. D.....*1914*...., the said....*Joseph Brown*....and....*Harry Parke, their*....heirs, executors and assigns....*covenant*....and....*agree*....with the said....*Charles Lane, his*....heirs, executors, administrators and assigns, to execute a good and sufficient deed of conveyance, in fee simple, free from all incumbrance, with full covenants of warranty for the above described premises.

NOW, if the said....*Brown*....and....*Parke*....shall well and truly keep, observe and perform....*their*....covenants and agreements herein contained on....*their*....part to be kept and performed, then this obligation to be void; otherwise to remain in full force and virtue.

IT IS EXPRESSLY UNDERSTOOD AND AGREED by and between the parties hereto, that time is of the essence of this contract, and, that in the event of the non-payment of said sum of money, or any part thereof, or the interest thereon, at the time or times herein named for its payment, that then the said....*Brown*....and....*Parke are*....absolutely discharged at law and in equity from any and all liability to make and execute such deed.

JOSEPH BROWN....[SEAL]
HARRY PARKE.....[SEAL]

NOTE. For witnesses or acknowledgment, see No. 33.

36. Bond for Payment of Money.

KNOW ALL MEN BY THESE PRESENTS, That....*we, Henry Price*....and....*William Arnold*...., of the....*City*....of....*Moline*...., in the County of....*Rock Island*...., State of....*Illinois, are*....held and firmly bound unto....*Samuel Wolf*...., of the....*City*....of....*Rock Island*...., County of....*Rock Island*...., in the State of....*Illinois*...., and to....*his*....heirs, executors, administrators and assigns, in the penal

sum of....*Four Hundred* (*$400.00*)....Dollars, lawful money of the United States, for the payment of which sum, well and truly to be made,....*we*.... bind....*ourselves, our*....heirs, executors and administrators, jointly, severally, and firmly, by these Presents.

WITNESS....*our hands and seals*....this....*first*....day of....*October*....A. D....*1914*....

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH That, WHEREAS, ...*Henry Price has*....agreed to pay....*Samuel Wolf*.... the sum of....*Three Hundred* (*$300.00*)....Dollars on or before....*October first*....A. D....*1916*...., with interest at the rate of....*five*....per cent per annum from date and has given his promissory note therefor and interest notes of....*Fifteen* (*$15.00*)....Dollars each, payable....*October first*....A. D....*1915*....and....*October first*....A. D....*1916*...., respectively.

NOW, if the said....*Henry Price*....and....*William Arnold*....shall and do, from time to time, and at all times hereafter, defend, save, keep harmless and indemnified, the said....*Samuel Wolf*....aforesaid, ...*his*.... heirs, executors, administrators, agents and attorneys, and all and each of them, of and from all actions, suits, costs, charges, damages, loss and expenses whatsoever (including attorneys' fees), which shall or may, at any time hereafter, happen or come to them, or either of them, for or by reason of the non-payment of said....*notes*....or on account of any trouble in their collection, then this obligation to be void, otherwise to remain in full force and effect.

HENRY PRICE.....[SEAL]
WILLIAM ARNOLD....[SEAL]
.....[SEAL]

NOTE. For witnesses or acknowledgment, see No. 33.

37. Public Officer's Bond.

KNOW ALL MEN BY THESE PRESENTS, That....*we, Alice Smith, Frank Ward*....and....*James Hardy*...., of....*Chicago*...., in the County of....*Cook*...., in the State of....*Illinois, are*....held and firmly bound unto the....*City*....of....*Chicago*....in the penal sum of....*Five Thousand* (*$5,000.00*)....Dollars, lawful money of the United States, for the payment of which said sum, well and truly to be made, ...*we*....bind ....*ourselves, our*....heirs, executors, and administrators, jointly, severally, and firmly by these Presents.

WITNESS....*our hands and seals*...., this....*fourth*....day of....*August*....A. D.....1914....

THE CONDITION OF THIS OBLIGATION IS SUCH That, if the said....*Alice Smith, her*....executors or administrators, shall from time to time, and at all times hereafter, duly and faithfully account for, apply, pay, transfer, and deliver up all and every the sum and sums of money and property which shall come to....*her*....hands or possession, the said ....*Alice Smith*...., or for or with which....*she*....shall be chargeable or

accountable by virtue of....*her*....office of....*City Clerk*...., or in consequence of....*her*....appointment to said office, according to the true intent and meaning of the statute, or regulation which may be in force in relation thereto, then the above obligation to be void; otherwise to remain in full force and effect.

ALICE SMITH.....[SEAL]
FRANK WARD.....[SEAL]
JAMES HARDY....[SEAL]

NOTE. For witnesses or acknowledgment, see No. 33.

[1] F. Corporation Forms.

38. Affidavit of Incorporation.

STATE OF.....*OHIO*.....}
County of.....*Cuyahoga*.....} ss.

....*James Simpson*...., President, and....*William Forbes*...., Secretary, each of lawful age, being duly sworn, upon their oaths, state that they make this affidavit for the purpose of complying with: An Act entitled "An Act to regulate the admission of foreign corporations for profit, to do business in the State of....*Illinois*." *Approved May 18, 1905. In force July 1, 1905*....

That they are respectively President and Secretary of....*Simpson Packing Company*...., a corporation duly incorporated under the laws of the State of....*Ohio*....on the....*first*....day of....*May*....A. D....*1902*...., for a term of....*ninety-nine*....years.

That the business said corporation proposes to pursue under its charter in the State of....*Illinois*....is as follows: ....*The slaughtering and killing of cattle, sheep, hogs and other animals for the purpose of preparing, packing and selling fresh and salt meats and meat products*....

That the amount of capital stock of said corporation is....*Fifty Thousand* (*$50,000.00*)....Dollars, and the proportion of the capital stock of said corporation which is represented by the property located and business transacted in the State of....*Illinois*....is....*one-fifth*...., and the amount of the said capital stock, so represented in the State of ....*Illinois*....is....*Ten Thousand* (*$10,000.00*)....Dollars; That said corporation is transacting, or intends to transact, business in the following states or countries:....*All of the states of the United States and in many of the foreign countries*....

That the amount paid in upon its capital stock is as follows: ....*Fifty Thousand* (*$50,000.00*)....Dollars.

That the property and assets and the estimated value thereof that will be employed in the business of said corporation in the State of....*Illinois*.... is as follows:....*A fully equipped packing plant and the total estimated value of the assets employed in the business in Illinois will be Twenty Thousand* (*$20,000.00*)....Dollars.

[1] For conveyance by corporation, see No. 71. For bond by corporation, see No. 113.

That the disposition made of capital stock subscribed for and not paid in, is as follows: ....*none*....

That the officers and directors of said corporation are as follows:

NAME		RESIDENCE
James Simpson,	President,	*Cleveland, Ohio.*
William Forbes,	Secretary,	*Cleveland, Ohio.*
Henry Jones,	Director,	*Cleveland, Ohio.*
Frank Ward,	"	*Toledo, Ohio.*
Fred Warren,	"	*South Bend, Indiana.*
John Wagner,	"	*Fort Worth, Texas.*
James Baker,	"	*Chicago, Illinois.*
Shelby Worthy,	"	*Chicago, Illinois.*
Harry Smoot,	"	*Chicago, Illinois.*

That the names and residences of all the stockholders as shown by the records are as follows:

....*Stock is all held by the above named directors*....

That the principal office in.....*Illinois*.....is at.....*214 W. Forty-second*....Street, in the....*City*....of....*Chicago, Illinois*.... That the name of the attorney in fact upon whom service can be had in all suits commenced in the State is....*Henry Sayre*....and his address is....*1200, 23 W. Washington*....Street, in the....*City*....of....*Chicago, Illinois*....

JAMES SIMPSON .....
PRESIDENT.

[CORPORATE SEAL]

WILLIAM FORBES....
SECRETARY.

STATE OF.....*OHIO*.....
County of.....*Cuyahoga*.....} ss.

On this....*fourth*....day of....*August*....A. D....*1914*....personally appeared before me, a Notary Public in and for said County in said State, ...*James Simpson*....and....*William Forbes*...., who are respectively President and Secretary of the above described corporation, and made oath that the foregoing statement by them subscribed is true in substance and in fact.

ALBERT TOWNER....
NOTARY PUBLIC.

[NOTARIAL SEAL]

39. Certificate of Dissolution.

STATE OF.....*IOWA*.....
County of.....*Des Moines*.....} ss.

I HEREBY CERTIFY,

That at a....*special*....meeting of the STOCKHOLDERS of the....*Hawkeye Automobile Company*....held on....*August fifth*....A. D.....*1914*...., at....*two*....o'clock....*P*.....M., pursuant to notice required by law, which said notice was delivered personally (or deposited in the postoffice) at least

thirty days before the time fixed for such meeting, properly addressed to each Stockholder, signed by a majority of the....*Directors*....of said Corporation, stating the time, place and object of said meeting, and a general notice stating the time, place and object of such meeting was also published for three successive weeks in the....*Des Moines Capital*...., a newspaper printed in the....*City*....of....*Des Moines*...., County of....*Des Moines*...., State of....*Iowa*...., the following resolution was adopted, at least two-thirds of all the votes represented by the whole stock of said Corporation voting therefor:

RESOLVED: That this Corporation be and the same is hereby dissolved.

IT IS HEREBY FURTHER CERTIFIED, That the debts of said Corporation have been fully discharged and the assets distributed among the Stockholders according to their respective rights.

JOHN SCHULTE....
SECRETARY.

STATE OF.....*IOWA*.....
County of.....*Des Moines*..... } ss.

I, ...*William Jones*...., being duly sworn, declare on oath that I am President of the Corporation mentioned in the foregoing certificate, and that the statements therein made are true in substance and in fact.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of said Corporation to be affixed, this....*tenth*....day of....*August*....A. D....*1914*....

[CORPORATE SEAL] *WILLIAM JONES*....
PRESIDENT.

NOTE. Acknowledgment before authorized official should accompany. See No. 17.

40. Certificate of Change of Name.

STATE OF....*ILLINOIS*....
County of.....*Cook*..... } ss.

Office of.....*Central Auto Company*.....
....*June seventh*....A. D....*1914*....

TO....*Harry Ward*....
SECRETARY OF STATE.

WE HEREBY CERTIFY That at a....*regular*....meeting of the stockholders of....*Central Auto Company*....held at....*155 N. Clark Street, Chicago, Illinois*...., on the....*seventh*....day of....*June*....A. D. ....*1914*...., pursuant to notice, in the following manner, to wit: by mailing to each of the stockholders of said corporation, on the....*fifth*....day of ....*May*....A. D.....*1914*....a written notice, signed by a majority of the directors of said corporation, properly addressed, stating the object of said meeting and the time and place when and where it would be held, and also by a general notice of the time, place and object of said meeting, published for three successive weeks in the....*Chicago Law Bulletin*...., a newspaper printed in....*Chicago*....in said County, the first publication of which

notice was on the....*sixth*....day of....*May*....A. D.....*1914*....and the last publication on the....*twenty-seventh*....day of....*May*....A. D. ....*1914*....the following question was submitted to the stockholders for their action:....*Shall the name of the corporation be changed from Central Auto Company to Chicago Automobile Company?*.... A motion being made to that effect, the resolution was adopted by the stockholders, two-thirds of all the votes represented by the whole stock of said corporation being in favor of the adoption of said resolution and voting therefor.

WITNESS our hands and the seal of said corporation, this....*seventh*.... day of....*June*....A. D....*1914*....

WILLIAM JONES....
PRESIDENT.

[CORPORATE SEAL] *JOHN SCHULTE*.....
SECRETARY.

STATE OF....*ILLINOIS*....
County of.....*Cook*..... } ss.

....*William Jones*...., being duly sworn, on oath says that he is President of....*Central Auto Company, now Chicago Automobile Company*...., and that he has read the foregoing certificate, and knows the contents thereof, and that the facts therein stated and set forth are true.

WILLIAM JONES.....
PRESIDENT.

NOTE. Add acknowledgment before authorized official. See No. 17.

41. Certificate of Stock.

No....*1*.... ....*200 Shares*....

INCORPORATED UNDER THE LAWS OF THE STATE OF
....*NEW JERSEY*....
....*CENTRAL AUTO COMPANY*....

Capital Stock....*$50,000.00*.... Shares....*$100.00*....each

THIS IS TO CERTIFY That....*William Jones*....is the owner of ....*Two Hundred*....Shares of the Capital Stock of....*Central Auto Company*...., transferable only on the Books of the Company, in person or by Attorney, on the surrender of this Certificate properly endorsed.

IN WITNESS WHEREOF, the Seal of the Company and the signatures of the President and Secretary are hereto affixed at....*Chicago, Illinois*...., this....*tenth*,...day of....*October*....A. D....*1914*....

WILLIAM JONES....
PRESIDENT.

[CORPORATE SEAL] *JOHN SCHULTE*.....
SECRETARY.

42. Notice of Meeting of Stockholders.

YOU are hereby notified that a regular meeting of the STOCKHOLDERS of the....*CENTRAL AUTOMOBILE CO*....will be held at the office of the corporation,.....*155 North La Salle Street, Chicago, Ill*...., on

the....*third*....day of....*September*....A. D.....*1914*....at....*two*.... o'clock....*P*.....M.

Dated the....*first*....day of....*August*....A. D....*1914*....

WILLIAM JONES,....
PRESIDENT.

By....*John Schulte, Secretary*....

43. Notice of Meeting to Organize.

TO....*Henry Fay*....

DEAR SIR: You are hereby notified that the capital stock of....*Central Auto Company*....has been fully subscribed, and that a meeting of the subscribers to the capital stock of said Company will be held at....*155 N. La Salle Street, Chicago*...., on the....*third*....day of....*May*....A. D. ....*1914*....at....*two*....o'clock....*P*.....M., for the purpose of electing a board of....*Directors*....and for the transaction of such other business as may be deemed necessary.

Dated the....*third*....day of....*April*....A. D....*1914*....

WILLIAM JONES.....
JAMES HANFORD....
JOHN SCHULTE.....
COMMISSIONERS.

44. Proxy to Vote at Meeting of Stockholders.

KNOW ALL MEN BY THESE PRESENTS, That....*I*....the undersigned....*stockholder*....in the....*Central Auto Company*...., do hereby appoint....*William Jones my*....true and lawful attorney, with power of substitution, for....*myself*....and in....*my name*...., to vote at the ....*special*....meeting of the stockholders in said Company, to be held at ....*Chicago, Illinois*...., on the....*seventh*....day of....*June*....A. D. ....*1914*...., or at any adjournment thereof, with all the powers....*I*.... should possess if personally present, hereby revoking all previous proxies.

....*May twentieth*....A. D....*1914*....

Witness: *FRANK WALKER*....[SEAL]
....*JOHN HENRY*.... .....[SEAL]
....*20*....Shares

45. Statement of Incorporation.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....} ss.

TO....*Harry Ward*...., SECRETARY OF STATE:

WE THE UNDERSIGNED, ...*William Jones, James Hanford, John Schulte, Henry Fay, Frank Walker*...., Citizens of the United States, propose to form a Corporation under an act of the General Assembly of the State of....*Illinois*...., entitled...."*An Act concerning Corpora-*

tions,'' approved April 18th, 1872....and all acts amendatory thereof, and that for the purposes of such organization we hereby state as follows, to wit:

1. The name of such Corporation is....*Central Auto Company*....

2. The object for which it is formed is....*the manufacture and sale of automobiles and automobile accessories*....

3. The Capital Stock shall be....*Fifty Thousand Dollars*....

4. The amount of each share is....*One Hundred Dollars*....

5. The number of shares is....*Five Hundred*....

6. The duration of the corporation shall be....*99*....years.

7. The location of the principal office is in the....*City*....of....*Chicago*....in the County of....*Cook*....in the State of....*Illinois*...., and the postoffice address of its business office is at....*No. 155 N. LaSalle Street*....in the said....*City*....of....*Chicago*....

[SIGNED]

WILLIAM JONES.....
JAMES HANFORD....
JOHN SCHULTE.....
HENRY FAY.....
FRANK WALKER....
.....
.....

NOTE. Should be acknowledged before an authorized official. See No. 38.

46. Subscription for Stock in a Corporation.

....*I*...., the undersigned, do hereby subscribe for....*ten*....shares of the capital stock of the....*Chicago Motor Company*...., a corporation, and, waiving all necessary assessments, ...*I*....agree to pay the said corporation for each of said shares the sum of....*Fifty* (*$50.00*)....Dollars in ....*two*....equal installments, one of said installments to be paid on the ....*second*....day of....*April*....A. D....*1914*....and one on the ....*second*....day of....*January*....A. D....*1915*...., a certificate for ....*five*....of said shares to be issued and delivered to....*me*....when each of said installments is paid; all payments to be made at the office of the said company, and said certificates to be delivered to....*me*....by said company.

WITNESS....*my hand and seal*....this....*seventh*....day of....*August*....*A. D*....*1913*....

JAMES SMITH....[SEAL]

G. Guaranties.

47. Guaranty of Fidelity of an Employee.

IN CONSIDERATION OF your having at....*my*....request agreed to engage.....*Henry Frank*....., of.....*Oak Park, Illinois*....., as your ....*Chief Clerk*....in the trade or business of....*Broker*....now carried

on by you at....*175 West Jackson Street, Chicago, I*....hereby undertake to guarantee and indemnify you to the extent of....*Two Hundred* (*$200.00*)....Dollars, but no further, against all losses or damages you may directly sustain or incur through the misconduct, negligence or disobedience of the said....*Henry Frank*....whilst acting and continuing to be employed by you in said capacity. This guaranty is to be and remain in force within the limits aforesaid for a period of....*two years*.... should the said....*Henry Frank*....continue without intermission in your service during that time, but not otherwise, notwithstanding any change or changes that may from time to time take place in the constitution of your firm entitling....*me*....but for this provision to revoke this guaranty.

Dated the....*fourth*....day of....*August*....A. D....*1914*....

To....*DEE & COMPANY*.... *JOHN FRIEND*....[SEAL]

.....[SEAL]

48. Guaranty for Goods Purchased.

TO....*Messrs. Rothschild & Co*...., of....*Chicago*...., and the persons who now or may from time to time constitute said firm:

GENTLEMEN:

IN CONSIDERATION OF your supplying....*John Jones*...., of ....*Springfield, Illinois*...., with goods upon credit, ...*I*....hereby guarantee you the due and regular payment of such sum or sums of money as at any time, and from time to time hereafter, ...*he*....shall owe you for goods so supplied, or for any other account; but....*I am*....not to be answerable for more than....*Two Hundred* (*$200.00*)....Dollars in respect of....*his*....dealing with you.

AND....*I*....give you full liberty to extend the period of credit to the said....*John Jones*....and to hold over or renew any bills, notes, or other securities which you may at any time hold, and to grant....*him*....and the persons liable upon the bills, notes, or other securities any indulgence, and to compound or otherwise compromise with....*him*....and them as you may think fit, without the same discharging or in any manner affecting ....*my*....liability by virtue of this guaranty.

Dated this....*fourth*....day of....*June*....A. D.....*1914*....

HENRY WARD....

49. Guaranty for Money Loaned.

FOR AND IN CONSIDERATION OF....*One* (*$1.00*)....Dollar, to ....*me*....in hand paid by the....*First National Bank of Evanston, Illinois*...., the receipt whereof is hereby acknowledged, and for other good and valuable considerations, ...*I*....hereby guarantee to said ....*bank*...., or....*its*....successor, or successors, or assigns, payment of a certain note for....*Two Hundred* (*$200.00*)....Dollars, given by ....*Richard Smith*....to said....*bank*....and due....*April tenth*....A. D. ....*1915*...., together with all legal or other expenses of or for collection; demand of payment, protest, and notice of protest waived.

HENRY WARD....[SEAL]

50. Guaranty of Rent.

[1] IN CONSIDERATION OF the letting of the premises above described ....*I*....guarantee punctual payment of the rents and the performance of the covenants in the above lease mentioned to be paid and performed by said lessee without requiring any notice of non-payment or non-performance, or proof of notice or demand being made whereby to charge....*me*.... therefor.

Dated:....*July 19, 1914*.... *HENRY JONES*....

H. Options.

51. Option for Sale of Realty.

....*I, Henry Mott*...., of....*245 N. Paulina Street, Chicago, Illinois*...., for and in consideration of the sum of.....*Fifty* (*$50.00*).....Dollars to ....*me*....in hand paid by....*Ezra Renner*....of....*335 S. Ashland Avenue, Chicago*....do hereby give to the said....*Ezra Renner, his*....heirs and assigns, the privilege of purchasing on or before the....*third*....day of ....*August*....A. D....*1914*....the following described real estate, situated in the County of....*Cook*....and State of....*Illinois*...., to wit: Lot....*Three* (*3*)....Block....*Four* (*4*), *Barnard's Subdivision*....to the ....*City*....of....*La Grange, Illinois*...., at and for the price of....*Three Thousand* (*$3,000.00*)....Dollars, to be paid as follows, viz., ...*One Thousand* (*$1,000.00*)....Dollars in cash and the sum of....*Two Thousand* (*$2,000.00*)....Dollars....*on or before August third*....A. D....*1915*.... to be secured by a mortgage or trust deed on said real estate, in form to be satisfactory to....*me*....; said cash payment to be made and securities delivered on or before the.....*third*.....day of.....*August*.....A. D. ....*1914*....to....*me at the above address*....

....*I*....ALSO AGREE to furnish an abstract of title, showing good title to said real estate. In case the privilege of purchase hereby given is exercised, the price above named paid and secured, and the securities accepted, as above provided, ...*I*....agree to convey and assure the said real estate to said....*Ezra Renner, his*....heirs or assigns, by a good and sufficient....*warranty*....deed, reciting a consideration of....*Three Thousand* (*$3,000.00*)....Dollars, free and clear of all liens or incumbrances whatsoever, except as to taxes, assessments, or impositions levied, assessed or imposed upon said real estate subsequent to....*August third*....A. D. ....*1914*....

THIS INSTRUMENT shall not be recorded, but is deposited by the said ....*Ezra Renner*....by mutual agreement, with....*Deposit Savings Bank, 200 N. Ashland Ave., Chicago*...., and in case the privilege of purchase hereby given is not exercised and the conditions hereof are not fully performed by said....*Ezra Renner, his*....heirs or assigns, and written notice of such exercise and performance are not given by....*Ezra Renner*....to ....*me*....on or before the....*third*....day of....*August*....A. D.

[1] To be endorsed on the lease.

....*1914*...., said privilege shall thereupon wholly cease (but no liability to refund the money paid therefor, shall arise); said abstract of title shall be returned in good order, and said....*Ezra Renner*....shall at once surrender this instrument to....*me*....for cancellation. During the existence of said privilege of purchase, this instrument shall be binding on ....*my*....heirs, executors, administrators and assigns, who may exercise the rights herein reserved by....*me*....and receive the surrender above mentioned.

WITNESS....*my hand and seal*...., this... *tenth*... day of....*June*... A. D....*1914*....

HENRY MOTT....[SEAL]

52. Option for Sale of Stock.

Chicago, Illinois, June 10...., A. D....*1914*....

FOR VALUE RECEIVED, ...*Henry Ward*....may call on the undersigned for....*Ten*....shares of the capital stock of the....*Milwaukee Railroad Company*...., at....*110*....per cent, any time within....*30*.... days from date. All dividends declared within said time are to go with said stock.

FRANK SMITH....[SEAL]

K. Partnership Forms.

53. Articles of Co-Partnership.

ARTICLES OF CO-PARTNERSHIP, Made the.....*fifth*.....day of ....*July*....A. D....*1914*...., between....*John Schmidt*...and...*Henry Jones, both*....of....*Jackson, Michigan*...., as follows:

The said parties above named have agreed to become co-partners in ....*the grocery*....business and, by these Presents, do agree to be co-partners together, under and by the name or firm of....*Schmidt & Jones*...., and to occupy the....*premises at 320 Main Street, Jackson, Michigan*.... Their co-partnership is to commence on the....*tenth*....day of....*July*.... A. D....*1914*...., and to continue....*five years*...., and, to that end and purpose, the said partners contribute....*Two Thousand ($2,000.00)*....Dollars each, to be used and employed in common between them, for the support and management of the said business, to their mutual benefit and advantage.

AND IT IS AGREED by and between the parties to these Presents, that at all times during the continuance of their co-partnership, they, and each of them, will give their attendance, and to their and each of their best endeavors, and to the utmost of their skill and power exert themselves for their joint interest, profit, benefit, and advantage, and truly employ, buy, sell, and merchandise with their joint stock, and the increase thereof, in the business aforesaid. *And also*, that they shall and will at all times during the said co-partnership, bear, pay, and discharge equally between them, all rents and other expenses that may be required for the support and management of the said business; and, that all gains, profit, and increase that shall

come, grow, or arise, from or by means of their said business, shall be divided between them....*equally*...., and all loss that shall happen to their said joint business by ill commodities, bad debts, or otherwise, shall be borne and paid between them....*equally*....

AND IT IS AGREED by and between the said parties, that there shall be had and kept at all times, during the continuance of their co-partnership, perfect, just and true books of account, wherein each of the said co-partners shall enter and set down, as well all money by them or either of them received, paid, laid out, and expenses in and about the said business, as also all goods, wares, commodities, and merchandise, by them or either of them bought or sold, by reason or on account of the said business, and all matters and things whatsoever to the said business, and the management thereof, in anywise belonging; which said books shall be used in common between the said co-partners, so that either of them may have access thereto, without any interruption or hindrance of the other. AND ALSO, the said co-partners, once in....*six months*....or oftener, if necessary, shall make, yield, and render, each to the other, a true, just, and perfect inventory and account of all profits and increase by them, or either of them, made; and also, all payments, receipts, disbursements, and all other things by them made, received, disbursed, acted, done, or suffered in this said co-partnership and business; and the same account so made, shall and will clear, adjust, pay, and deliver, each to the other, at the time, their just share of the profits so made.

AND the said parties hereby mutually covenant and agree to and with each other, that during the continuance of the said co-partnership, neither of them shall or will endorse any note, or otherwise become surety for any person or persons whomsoever, without the consent of the other of the said partners. And at the end or other sooner determination of their co-partnership, the said co-partners, each to the other, shall and will make a true, just, and final account of all things relating to their said business, and in all things truly adjust the same; and all and every the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts, or otherwise, shall be divided between them....*equally*....

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals, the day and year first above written.

JOHN SCHMIDT.....[SEAL]
HENRY JONES.....[SEAL]

Signed and Sealed in the Presence of
....*WILLIAM TALLMAN*....
....*HARRY FRIEND*.....

54. Articles for Admission of New Partner.

AGREEMENT, Made this...*tenth*...day of...*June*....A. D....*1914*..., between....*John Ayres*....and....*Frank Ayres*...., constituting the firm of....*Ayres & Company*...., of the first part, and....*Henry Smith*....of the second part.

1. WHEREAS, by an indenture dated the....*tenth*....day of....*May*...., A. D....*1910*...., between the said parties of the first part, they became partners in the business of.....*Commission Men*.....for the term of ....*five years*....and have continued to be partners from the day of the date of said indenture to the present time;

2. AND, WHEREAS, the said persons have agreed to admit the said ....*Henry Smith*....into partnership with them in the said business for the residue of the said term of....*five years*...., upon the terms and conditions hereinafter mentioned, and whereas it was agreed that a valuation should be made of the whole of said partnership property and effects and that the said....*Henry Smith*....should pay unto the said parties of the first part the amount of such valuation, and be admitted to a proportionate share of the profits and losses of the said business;

3. AND, WHEREAS, such valuation has been made accordingly and has been fixed at the sum of....*Three Thousand* (*$3,000.00*)....Dollars;

4. *NOW, THIS INDENTURE WITNESSETH,* That in consideration of the sum of....*One Thousand* (*$1,000.00*)....Dollars, being....*One-third*.... of the valuation of the said partnership property, paid by the said....*Henry Smith*....to the said parties of the first part, then, the said parties of the first part, admit the said....*Henry Smith*....as a partner in the said business until the....*tenth*....day of....*May*....A. D....*1915*...., which said business shall henceforth be carried on under the style or firm of ....*Ayres, Smith & Ayres*....; and the profits and losses of the said partnership shall be equally divided and borne by the said parties hereof, and the said partnership business shall be carried on by them under and subject to the same terms, covenants, stipulations, provisions, declarations and agreements as are expressed and contained in the said hereinbefore recited indenture of partnership of the....*tenth*....day of....*May*....A. D....*1910*...., of and concerning said capital, stock in trade, and effects, in all and singular the other matters and things therein mentioned and comprised and that as fully and effectually to all intents and purposes as if the same terms were expressed and contained in these presents, and inserted with the name of the said....*Henry Smith*....herein.

5. AND IT IS HEREBY AGREED by and between the said parties that subject to the covenants herein contained the said partnership estate and effects shall be and remain unto the said three partners constituting the said new firm of....*Ayres, Smith & Ayres*...., their respective executors, administrators and assigns, in equal shares and proportion.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and date first above written:

JOHN AYRES.....[SEAL]
FRANK AYRES.....[SEAL]
HENRY SMITH.....[SEAL]

55. Articles of Co-Partnership Between Lawyers.

....*Frank Irwin, Edward Lehman and Henry Ward*....hereby form a partnership as....*Attorneys and Counselors*....under the name of....*Irwin,*

Lehman & Ward...., to continue for....*five years*....from this date; but any of the parties may retire on....*one month's*....notice, in writing. In case any of the parties does retire, however, his name shall still remain as a member of the firm at the will of the firm.

Each of the members shall receive....*One-third*....of all the business receipts, including counsel fees from all sources, after deducting expenses. Each party shall devote all his work and time to the business of the firm. All receipts shall be deposited in a bank to be selected by the firm in the name of the firm; and after current expenses are paid, shall be divided whenever there is a sum on hand exceeding....*Three Hundred* (*$300.00*).... Dollars. All checks must be endorsed by one of the members of the firm and countersigned by another. No member of the firm shall become endorser or security in any manner for any other person without the consent of all the other members of the firm.

FRANK IRWIN.....[SEAL]
EDWARD LEHMAN....[SEAL]
HENRY WARD.....[SEAL]

Dated:....*June tenth*....A. D....*1914*....

56. Certificate of Partnership.

STATE OF....*ILLINOIS*....
County of.....*Cook*..... } ss.

THIS IS TO CERTIFY, that the undersigned have, pursuant to the provisions of the Statutes of the State of....*Illinois*...., formed a limited partnership, under the firm name of....*Hoyne & O'Connor*....and the general nature of the business to be transacted is....*Buying and Selling Stock*...., and that....*John Hoyne and Harry O'Connor*....are the partners therein, and that each of them has contributed the sum of....*One Thousand* (*$1,000.00*)....Dollars, as capital toward the common stock, and that the said partnership is to commence on the....*eighteenth*....day of....*August*....A. D....*1914*...., and is to terminate on the....*eighteenth*....day of....*August*....A. D....*1916*....

JOHN HOYNE.....
HARRY O'CONNOR....

Dated this....*tenth*....day of....*August*....A. D....*1914*....

57. Notice of Dissolution of Partnership.

NOTICE IS HEREBY GIVEN that the partnership lately subsisting between us, the undersigned, ...*Frank Ayres*....and....*Henry Smith*...., carrying on business as....*Jewelers*....at....*209 So. La Salle St., Chicago, Illinois*...., under the style or firm of....*Ayres & Smith*...., was on the ....*third*....day of....*August*....A. D....*1914*...., dissolved by mutual consent and that the business in the future will be carried on by the said ....*Frank Ayres*....alone.

FRANK AYRES....
HENRY SMITH....

L. Pledges.

58. Pledge of Chattels as Security for a Loan.

To....*Clarence Smith, of Evanston, Illinois*....:

....*I*....hereby deposit with you the articles specified in the annexed schedule as security for the payment to you of....*my note*....of this date, for the sum of....*One Hundred* (*$100.00*)....Dollars, payable in....*six months*...., with interest thereon at the rate of....*six*....per cent per annum; and....*I*....hereby authorize you in the event of the non-payment of said....*note*....at maturity, to sell the same at public or private sale, at such time as you may think proper, without giving notice to....*me*.... of the time or place of sale; and out of the proceeds thereof, to retain the amount of said....*note*...., both the principal and interest therefor, paying the residue, if any, to....*me*.....

WILLIAM SCHULTZ....[SEAL]

Dated this....*tenth*....day of....*July*....A. D....*1914*....

59. Pledge of Shares of Stock.

New York, July 7...., A. D....*1914*....

To....*Henry Clay*....:

Having borrowed from you the sum of....*Two Hundred* (*$200.00*).... Dollars, which is to be re-paid to you on the....*first*....day of....*August*....A. D....*1914*...., and which sum is secured by....*my promissory note*....in your favor for that amount bearing even date herewith, ...*I*.... have, for further securing the re-payment of such sum, transferred ....*two*....shares of the....*New York Central Railroad Co. stock*....in your name on the books of the said company, to be held by you on the following terms, namely:

1. All dividends which may be declared upon the shares are to be received by you and paid to....*me*....

2. All new shares created in respect of the above shares are to be held by you as the original shares, the calls or assessments made thereon to be paid by....*me*....

3. On the....*first*....day of....*August*....A. D.....*1914*...., upon your being re-paid the amount advanced as above, with interest thereon at the rate of....*six*....per cent per annum, the said....*two*....shares and all newly created shares (if any) are to be re-transferred to....*me*....

4. If....*I*....shall make default in re-payment of the said advanced sum on the....*first*....day of....*August*....A. D.....*1914*...., or in payment of the said calls as they shall become due, you may at any time afterwards, on giving....*me five days*....notice of your intention so to do and without being liable for any change in prices which may have taken place in the meantime, and without any further consent by....*me*...., sell the said ....*two*....shares and any such new shares as aforesaid, at such price or prices, and in such manner and in all respects as you shall think proper and may retain out of the proceeds the amount that is due to you, with interest

thereon at the rate aforesaid, and all costs attending the said sale, and may demand and claim of....*me*....any balance that may remain unpaid by the means aforesaid. *RICHARD ROWE*....[SEAL]

....*I*...., the undersigned....*Henry Clay*...., hereby agree to hold the said shares upon the terms and conditions before mentioned.

HENRY CLAY.....[SEAL]

M. Powers of Attorney.

60. General Power of Attorney.

KNOW ALL MEN BY THESE PRESENTS, That....*I, John Smith*...., of the....*City*....of....*Chicago*...., County of....*Cook*....in the State of ....*Illinois*...., have made, constituted, and appointed and by these presents do make, constitute, and appoint....*Henry Meyers*...., of the ....*City*....of....*Rockford*...., County of....*Winnebago*....in the State of....*Illinois, my*....true and lawful attorney, for....*me*....and in....*my name*...., place, and stead to act for....*me*...., giving and granting unto....*Henry Meyers, my*....said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about any business transactions which....*I*....may have in....*Winnebago County*...., as fully to all intents and purposes as....*I*.... might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all that ....*my*....said attorney, or his substitute, shall lawfully do or cause to be done by virtue hereof.

IN TESTIMONY WHEREOF, ...*I*....have hereunto set....*my hand and seal*...., this....*seventh*....day of....*August*....A. D....*1914*....

JOHN SMITH....[SEAL]

NOTE. Acknowledgment before an authorized official should accompany. See No. 17.

N. Releases.

61. General Release of All Claims.

IN CONSIDERATION OF the sum of....*One Hundred* (*$100.00*).... Dollars, to....*me*....in hand paid by....*The Acme Chemical Company*...., a corporation, the receipt of which is hereby acknowledged, ...*I*....do hereby RELEASE the said....*Company, its*....agents and servants, of and from all claims, demands, actions, causes of action or suits at law for or because of any matter or thing done, omitted or suffered to be done by the said....*Company, its*....agents or servants, up to and including the day of the date hereof, and more especially on account of....*all personal injuries accidentally suffered by me on or about the third day of July, A. D. 1912, while I was employed by said company*....

(1) (2) (3) (4) (5)

*WITNESS.....my hand and seal.....*at*.....Chicago, Illinois.....*, this *....fourth....*day of*....June....*A. D.*....1914....*

(*....I....*have read this release.)

HENRY WARD.....[SEAL]

The above release was read to and explained to the said*.....Henry Ward....* and signed by*....him....*in our presence.

ALBERT COOK.....

HENRY CUMMINS.....

WITNESSES.

(1) Where an interpreter has to be used, the following change should be made:

The above release was translated to*....me....*from the*....English....* into the*....Polish....*language by*....Stanley Weisschowski....*and is fully understood by*....me....*and is herewith voluntarily signed by*....me....* with full appreciation of its legal effect. Witness*....my hand and seal....* at*....Hammond, Indiana....*this*....fourth....*day of*....June....*A. D. *....1914....*

MIKE POLOWSKY....[SEAL]

STATE OF*....INDIANA....*
County of*.....Lake.....* } ss.

....Stanley Weisschowski...., being first duly sworn, deposes and says that he translated the above release fully and accurately from the*....English....*into the*....Polish....*language to*....Mike Polowsky....*, and said *....Polowsky....*thereupon signed said instrument, saying that*....he....* did so voluntarily and with full understanding of its legal effect.

STANLEY WEISZCHOWSKI....[SEAL]

Subscribed and sworn to before me, a Notary Public, this*....fourth....* day of*....June....*A. D.*....1914....*

HARRY SMITH....

[NOTARIAL SEAL] NOTARY PUBLIC.

Witnesses to All Signatures:

....JOHN WILLIAMS....

....HARRY KELLER.....

(2) Where the party releasing is blind, the following should be used:

The above release was read to*....me....*by*....James Harrington....* and was fully understood by*....me....*as so read, and is herewith voluntarily signed by*....me....*by*....my mark....*with full appreciation of its legal effect as so read.

Witness*....my hand and seal....*at*....Chicago, Illinois....*, this *....fourth....*day of*....June....*A. D.*....1914....*

his

JAMES X *WARD....*[SEAL]

mark

STATE OF*....ILLINOIS....*
County of*.....Cook.....* } ss.

Subscribed*....by mark....*and*....affirmed to....*before me, a Notary Public, this*....fourth....*day of*....June....*A. D.*....1914....*, by *....James Ward....*, a blind person, after the above instrument had been

read to said....*James Ward*....exactly as written and....*he*....had stated that....*he*....fully understood and appreciated the legal effect of said instrument and signed same voluntarily.

[NOTARIAL SEAL] *HARRY SMITH*....
NOTARY PUBLIC.

(3) Where release is given by Administrator of deceased person, it should be signed, ...*James F. Bishop*...., Administrator of the estate of....*James Harrington*...., deceased.

NOTE. The consideration for release by Administrator should not be paid until order has been entered by court having jurisdiction of estate of deceased, permitting the settlement. A certified copy of the order entered may be furnished or proof of the entry of order may be obtained from the court records.

(4) Where release is of right of action belonging to insane person, the release should be signed....*John E. Williams*...., Administrator of ....*Henry Ward*...., insane. Here the release should recite that the conservator is acting in pursuance of an order of the....*County*....Court of ....*Du Page*....County so authorizing.

(5) Where the party releasing has an action against two or more joint tort-feasors and desires to release only one, the following form commonly called a covenant not to sue may be used:

....*$100.00*.... ....*Chicago, Illinois, April 25th*....A. D.....*1914*....

For and in consideration of the sum of....*One Hundred* (*$100.00*).... Dollars to me in hand paid by....*Acme Chemical Company, a corporation*...., the receipt of which is hereby acknowledged, I do hereby agree not to begin or further prosecute any action or actions against said ....*Acme Chemical Company*....for or on account of....*all personal injuries accidentally suffered by me on or about the third day of July*.... A. D....*1913, when I was a passenger on a street car which had a collision with a wagon belonging to said Acme Chemical Company.*

Witnesses: *JOHN SMOOT*....
....*HARRY JONES*....
....*ROY SMITH*....

62. Mutual Release.

INDENTURE, Made the....*fourth*....day of....*August*....A. D. ....*1914*...., between....*Albert Jones*....of....*Hammond*....of the County of....*Lake*....and State of....*Indiana*...., of the one part, and ....*Employers' Casualty Company, a corporation*....of the State of ....*New York*...., of the other part:

WHEREAS, there have been various business transactions between the said parties, the said....*Employers' Casualty Company having issued various policies of liability insurance to*....the said....*Albert Jones*....concerning which disputes and differences have arisen between the parties as to the....*premiums*....due from the said....*Albert Jones*....to the said ....*Employers' Casualty Company*....,

AND WHEREAS, it is desired to compromise and settle said disputes and differences,

AND WHEREAS, said....*Albert Jones*....has agreed to pay the sum of....*Five Hundred* (*$500.00*)....Dollars, and the said....*Employers' Casualty Company*....has agreed to accept said sum in full satisfaction, compromise and discharge of....*its*....claims against said....*Albert Jones*....for....*premiums*....;

NOW THEREFORE in consideration of the promises made each to the other and in consideration of the sum of....*Five Hundred* (*$500.00*).... Dollars paid by said....*Albert Jones*....to said....*Employers' Casualty Company*...., receipt of which is hereby acknowledged, IT IS HEREBY MUTUALLY AGREED that all claims the one may have against the other in regard to said....*premiums*....now in dispute are hereby released and forever discharged;

PROVIDED that nothing herein contained shall be construed as constituting a waiver of any of the conditions of any....*policies or agreements*.... now in force between said parties, or to disturb either of said parties in any rights now existing to them thereunder. Likewise, this agreement is not to affect any rights....*or premiums*....arising under future....*policies or agreements*....

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

ALBERT JONES....[SEAL]

[CORPORATE SEAL] *EMPLOYERS' CASUALTY COMPANY*....

Attest: By....*James Warren, Vice President*....
....*William Henry, Secretary*....

Witnesses to Signature of....*Albert Jones*....:
....*FRANK HAWLEY*....
....*HARRY JONES*.....

NOTE. Affidavit of authority of officers of corporation to execute may be added. See No. 71.

CHAPTER II.

CONVEYANCING FORMS.

A. Acknowledgments.

63. Acknowledgment by Attorney in Fact.

STATE OF....*WISCONSIN*....
County of.....*Milwaukee*.....} ss.

On this....*second*....day of.....*August*.....A. D.....*1914*....., before me, a Notary Public in and for the above County and State, appeared ....*John Troy*...., known to me to be the....*person*....whose....*name is*....subscribed to the within instrument as the attorney in fact of ....*James Hatch*...., and acknowledged to me that....*he*....subscribed the....*name*....of....*James Hatch*....thereto as....*principal*....and ....*his*....own name as attorney in fact. *JAMES CLARK*....

[NOTARIAL SEAL] NOTARY PUBLIC.

64. Acknowledgment by Husband and Wife.

STATE OF....*RHODE ISLAND*....
County of.....*Lowell*.....} ss.

In the....*Town*....of....*Bradford*....in the said County and State, on this....*third*....day of....*May*....A. D.....*1914*...., personally appeared before me the within named....*Charles Day*....and acknowledged the within instrument by him signed to be his free, voluntary act and deed.

And at the same time came....*Anna Day*...., wife of the said....*Charles Day*...., and being by me examined separate and apart from her husband, acknowledged and declared the said instrument by her signed, to be her free act and deed, and that she did not wish to retract it.

JAMES CLARK....

[NOTARIAL SEAL] NOTARY PUBLIC.

NOTE. A number of states require the wife to be examined separate and apart from her husband as indicated above. Some statutes give the language necessary to a proper acknowledgment. The majority do not require separate examination. The statutes of each state should be carefully consulted. See also form No. 69.

65. Acknowledgment by Individual.

STATE OF....*IOWA*....
County of.....*Greene*.....} ss.

In....*Albia*....in said County and State, on this....*second*....day of ....*May*....A. D.....*1914*...., before me personally appeared....*John*

May...., to me known to be the....*person*....described in and who executed the foregoing instrument, and acknowledged that....*he*....executed the same as....*his*....free act and deed. *FRANK SMITH*....
[NOTARIAL SEAL] NOTARY PUBLIC.

NOTE. See also acknowledgment accompanying No. 17.

66. Certificate Added to Acknowledgment by Foreign Notary.

STATE OF....*IOWA*....
County of.....*Greene*.....} ss.

I, ...*William Day*...., clerk of the....*Circuit Court*....in and for said County, which is a court of record, having a seal, do hereby certify that ....*James Clarke*...., by and before whom the foregoing....*acknowledgment*.....was taken, was, at the time of taking same, a.....*Notary Public*....residing in said County, and was duly authorized by the laws of the said....*State*....to take and certify acknowledgments or proofs of deeds in said....*State*...., and further that I am acquainted with the handwriting of said....*James Clarke*....and that the signature of said....*James Clarke*....to said acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this....*third*....day of....*August*....A. D. ....*1914*.... *WILLIAM DAY*....
[SEAL OF COURT] CLERK OF GREENE COUNTY CIRCUIT COURT.

NOTE. This certificate is sometimes made by the Secretary of State or by the County Clerk. Statutes of the various states and territories should be consulted.

B. Deeds.

67. Deed of Gift.

THIS INDENTURE, Made this.....*ninth*.....day of.....*August*..... A. D.....*1914*...., between....*Herman Baker, party*....of the first part, and....*Albert Wagner, party*....of the second part:

WITNESSETH: WHEREAS, ...*Albert Wagner is*....the....*nephew*.... of....*Herman Baker*....; NOW, THEREFORE, in consideration of natural love and affection which....*he has*....unto said....*Albert Wagner*...., and for the better support and maintenance of said....*Albert Wagner, Herman Baker does*....hereby give, grant, convey and confirm unto the said....*Albert Wagner, his*....heirs and assigns forever, all that certain piece of property described as follows, to wit: ....*Northwest One-Quarter* (¼)....Section....*Five* (*5*)....Township....*Four* (*4*) *North*.... Range....*Two* (*2*), *East*....of the....*Third*....Principal Meridian. To have and to hold the same, together with all the tenements, hereditaments and appurtenances thereto belonging, unto the said....*Albert Wagner, his*....heirs, and assigns, forever.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

HERMAN BAKER.....[SEAL]
ALBERT WAGNER.....[SEAL]

68. Mining Deed.

THIS INDENTURE, Made this....*fourth*....day of....*June*....A. D. ....*1914*....between....*Fred Warrick*...., of the....*City*....of....*Marion*...., of the County of....*Marion*....and State of....*Colorado*...., of the first part, and....*James Frederick*...., of the....*City*....of ....*Ogden*...., of the County of....*Ogden*...., and State of....*Utah*...., of the second part:

WITNESSETH, That said....*party*....of the first part, for and in consideration of the sum of....*Four Thousand* (*$4,000.00*)....Dollars, lawful money of the United States of America, to said....*party*....of the first part, in hand paid by said....*party*....of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, ...*has*....granted, bargained, sold, released, conveyed, and QUITCLAIMED, and by these presents....*does*....grant, bargain, sell, release, convey, and QUITCLAIM unto said....*party*.... of the second part, ...*his*....heirs and assigns forever, ...*all his right and interest*....in and to the following described mining property, situated in....*Cripple Creek*....District, in the County of....*Marion*...., State of ....*Colorado*...., to wit: That certain quartz-mining claim, lode, lead, ledge or mineral deposit, known as the....*Bradford Claim*...., being so situated in Section....*Three* (*3*)...., Township....*Twenty* (*20*) *North*...., Range....*Six* (*6*), *East*....of the....*Fourth* (*4th*)....Principal Meridian, together with all the dips, spurs, angles and variations, also all the metals, ores, gold and silver-bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed: and also all and singular the tenements, hereditaments and appurtenances thereto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said....*party*....of the first part of, in or to the said premises, and every part and parcel thereof, with the appurtenances; TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said....*party*....of the second part, ...*his*....heirs and assigns forever.

IN WITNESS WHEREOF, the said....*party*....of the first part ....*has*....hereunto set....*his hand and seal*....the day and year first above written.

FRED WARRICK....[SEAL]
.....[SEAL]
.....[SEAL]

Signed, Sealed and Delivered in the Presence of

....*JAMES FORBES*....
....*HARRY BRAGG*.....

NOTE. For acknowledgment, see No. 69.

69. Quitclaim Deed.

THIS INDENTURE, Made this....*third*....day of....*May*....A. D. ....*1914*....between....*Henry Smart*....and....*Helen Smart*....of the ....*City*....of....*Berwyn*....in the County of....*Cook*....and State of ....*Illinois, parties*....of the first part, and....*James Warden*....of the....*City*....of....*Waterloo*....in the County of....*Blackhawk*....and State of....*Iowa, party*....of the second part:

WITNESSETH, That the said....*parties*....of the first part, for and in consideration of the sum of....*Seven Thousand* (*$7,000.00*)....Dollars in hand paid by the said....*party*....of the second part, the receipt whereof is hereby acknowledged, and the said....*party*....of the second part forever released and discharged therefrom, ...*have*....granted, bargained, sold, remised, released, conveyed, aliened and confirmed, and by these presents ....*do*....grant, bargain, sell, remise, release, convey, alien and confirm, unto the said....*party*....of the second part, and to....*his*....heirs and assigns FOREVER, all the following described lot, piece, or parcel of land, situated in the County of....*Cook*....and State of....*Illinois*....and known and described as follows, TO WIT: ....*the West One Hundred* (*W. 100*) *feet of Lot One* (*1*)....of....*Gary's Addition*....to the....*original Village*....of....*Hyde Park*...., TO HAVE AND TO HOLD THE SAME, together with all and singular the appurtenances and privileges thereunto belonging, or in any wise thereunto appertaining; and all the estate, right, title, interest and claim whatever, of the said....*parties*....of the first part, either in law or equity, to the only proper use, benefit and behoof of the said....*party*....of the second part, ...*his*....heirs and assigns, forever.

AND the said....*parties*....of the first part hereby expressly....*waive*.... and....*release*....any and all right, benefit, privilege, advantage and exemption under or by virtue of any and all Statutes of the State of ....*Illinois*....providing for the Exemption of Homesteads from sale on execution or otherwise.

IN WITNESS WHEREOF, the said....*parties*....of the first part ....*have*....hereunto set....*their hands and seals*....the day and year first above written.

HENRY SMART.....[SEAL]
HELEN SMART.....[SEAL]

Signed, Sealed and Delivered in the Presence of
....*ALBERT CUMMINGS*....
....*FRED JENNINGS*.....

STATE OF....*ILLINOIS*....
County of..... *Cook* .....} ss.

I, ...*Albert Williams*...., a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY, That....*Henry Smart*...., who....*is*....personally known to me to be the real....*person*....whose ....*name is*....subscribed to the within instrument as having executed the same, appeared before me this day, in person, and acknowledged that....*he*....signed, sealed and delivered the said instrument of writing

as....*his*....free and voluntary act, for the uses and purposes therein set forth, and thereby conveyed all....*his*....right, title and interest in and to the premises described in said instrument, and expressly waived and released all right, title and benefit of exemption under any and all Homestead Exemption Laws, so called, of said State of....*Illinois*....

AND the said....*Helen Smart*...., wife of the said....*Henry Smart*...., having been by me examined, separate and apart from, and out of the hearing of her husband, and the contents and meaning of said instrument, and all her rights under the Homestead Laws of the State of....*Illinois*.... having been by me made known and fully explained to her, acknowledged it to be her act and deed, and that she had executed the same, and relinquished her dower and all other right, title and interest in and to the lands and tenements therein mentioned, and expressly waived and released all her rights and advantages under and by virtue of all laws of said State of ....*Illinois*....relating to the Exemption of Homesteads, all voluntarily and freely, and without the compulsion of her said husband, and that she does not wish to retract the same.

GIVEN under my hand and notarial seal, this.....*third*.....day of ....*May*....A. D....*1914*....

[NOTARIAL SEAL] *ALBERT WILLIAMS*....

NOTE. This form is designed to satisfy requirements of any state. Much shorter forms are in use in the different states, and in many states there are statutory forms, whose substance may be obtained from the statutes. Space does not permit of giving all these here. One statutory form of a quitclaim deed and of a warranty deed are shown. See No. 70 and No. 74.

This acknowledgment is likewise intended to be broad enough to satisfy the requirements of any state. Many states do not require examination of the wife separate and apart from the husband, as in the above acknowledgment. Other statutes prescribe the language of the acknowledgment. In some states the acknowledgment in No. 17 would be sufficient.

A seal is generally required in the Eastern States, but in most of the Western States the use of a seal has been abolished. Corporations, however, must use a seal.

Witnesses are necessary in some states and unnecessary in others. It is the usual rule that witnesses are not required where an instrument has been acknowledged before a public official. These are matters concerning which the statutes of any particular state should be carefully consulted.

70. Statutory Form of Deed.

The....*grantor, Henry Hart*...., of....*Wilmette*...., in the County of ....*Cook*...., in the State of....*Illinois*...., for the consideration of ....*Two Hundred* (*$200.00*)....*Dollars, ...conveys and quitclaims*....to ....*William Henry*...., of....*Wilmette*...., in the County of....*Cook*.... in the State of....*Illinois*...., all interest in the following described real estate, TO WIT: Lots....*Two* (*2*)....and....*Three* (*3*)...., Block....*Four*

(4), *Hart's Addition*....to the....*Village*....of....*Wilmette*...., situated in the County of....*Cook*...., in the State of....*Illinois*....

Dated this....*seventh*....day of....*August*....A. D....*1914*....

HENRY HART....

NOTE. Add acknowledgment before authorized official. See No. 17.

71. Release Deed.

KNOW ALL MEN BY THESE PRESENTS, That....*State Bank of Marion*....of the County of....*Marion*....and State of....*Iowa*....for and in consideration of ....*Two* (*$2.00*)....Dollars, and for other good and valuable considerations, the receipt whereof is hereby confessed, ...*does*.... hereby remise, convey, release and quitclaim unto....*Frank Ward*....and ...*Alice Ward*...of the County of...*Marion*...and State of...*Iowa*... all the right, title, interest, claim or demand, whatsoever....*it*....may have acquired in, through or by a certain....*Trust*....Deed, bearing date the ....*fourth*....day of....*August*....A. D....*1914*....and recorded in the Recorder's Office of....*Marion*....County, in the State of....*Iowa*...., as Document No....*3261*....in Book....*3*....of....*Mortgages*...., page ....*231*...., to the premises therein described, as follows, TO WIT: Lot ....*Six* (*6*)...., Block....*Three* (*3*)....of....*Eldridge's Subdivision*.... to the....*City*....of....*Marion*...., situated in the....*City*....of....*Marion*....County of....*Marion*....and State of....*Iowa*...., together with all the appurtenances and privileges thereunto belonging or appertaining.

WITNESS the....*hand and seal of the corporation*...., by....*its President*...., this....*fourth*....day of....*August*....A. D....*1914*....

[CORPORATE SEAL] *STATE BANK OF MARION*.....

By....Albert Wolf, President....

STATE OF....*IOWA*....
County of....*Marion*.....} ss.

On this....*fourth*....day of....*August*....A. D....*1914*....before me personally appeared....*Albert Wolf*...., to me known to be the....*President*....of the....*State Bank of Marion*...., the corporation which has executed the above instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that....*he*....was duly authorized by the ....*Board of Directors*....of said corporation to execute said instrument for and in the name of the corporation, and that the seal thereto affixed is the seal of said corporation.

Given under my hand and....*official*....seal, the day and year first above written.

[OFFICIAL SEAL] *JOHN WILLIAMS*....

COMMISSIONER OF DEEDS.

NOTE. Acknowledgment may be made before any authorized official. See No. 38. For acknowledgment where release is by an individual, see No. 69.

72. Trust Deed.

THIS INDENTURE WITNESSETH, That the....*grantors, Frank Ward and Alice Ward, his wife*..., of...*Marion, Marion*...County, ...*Illinois*..., for and in consideration of the sum of....*Two Thousand* (*$2,000.00*).... Dollars, in hand paid, ...*convey*....and....*warrant*....to....*State Bank of Marion, Trustee*....of....*Marion*....County....*Illinois*...., and to ....*its*....successors in trust hereinafter named, the following described real estate, with the improvements thereon, including all heating, gas and plumbing apparatus and fixtures, and everything appurtenant thereto, situated in the County of....*Marion*...., in the State of....*Illinois*...., TO WIT: Lot....*Six* (*6*)....of....*Eldridge's Subdivision*....to the ....*City*....of....*Marion*...., hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of ....*Illinois*....

IN TRUST nevertheless, for the purpose of securing performance of the covenants and agreements herein.

WHEREAS, The....*grantor, Frank Ward, is*....justly indebted upon ....*his four* (*4*)....principal promissory....*notes*....bearing even date herewith, payable to the order of....*State Bank of Marion*...., falling due ....*one* (*1*), *two* (*2*), *three* (*3*), *four* (*4*) *years*....after date, with interest at the rate of....*six*....per cent per annum until maturity, as more fully evidenced by....*ten* (*10*)....coupon interest....*notes*....falling due ....*six* (*6*), *twelve* (*12*), *eighteen* (*18*), *twenty-four* (*24*), *thirty* (*30*), *thirty-six* (*36*), *forty-two* (*42*) *and forty-eight* (*48*) *months*....after date.

THE....*grantors covenant and agree*....as follows: (1) to pay said indebtedness, and the interest thereon, as herein and in said....*notes*....provided, or according to any agreement extending time of payment; (2) to pay, prior to the....*first day of July*....in each year, all taxes and assessments against said premises, and, on demand, to exhibit receipts therefor; (3) within....*sixty*....days after destruction or damages to rebuild or restore all buildings or improvements on said premises that may have been destroyed or damaged; (4) that waste to said premises shall not be committed or suffered; (5) that said premises shall not become liable for any mechanics' lien, or for any lien conflicting with, or superior to, the lien hereof; and (6) to keep all buildings at any time on said premises insured against loss by fire, lightning and tornadoes, in companies to be approved by the holder of, and in amount at least equal to, said indebtedness, and deliver to the holder of said indebtedness the insurance policies for that amount, and in addition all policies for insurance in excess of said indebtedness, all so written as to require all loss to be applied in reduction of said indebtedness. In the event of failure so to insure, or pay taxes or assessments, or to remove any such mechanics' or conflicting or superior lien, the....*grantee*...., or the....*holder*....of said indebtedness, may procure such insurance, or pay such taxes or assessments or remove any such mechanics', or conflicting or superior lien, or discharge or purchase any tax lien or title affecting said premises; and all money expended in so doing, or otherwise expended in maintaining the priority of the lien hereof, the

....*grantors agree*....to repay immediately, without demand, and the same, with interest thereon from the date of payment, at....*seven*....per cent per annum, shall be so much additional indebtedness secured hereby. The ....*grantee is*....empowered to adjust, compromise, submit to arbitration and appraisement and collect, and apply to the reduction of said indebtedness, any claim for loss arising under any insurance policy covering said premises; and to that end the....*grantee is*....irrevocably appointed the ....*attorney in fact*....of the....*grantors*....for....*them*....and in ....*their names*....and stead to execute and deliver such receipts, releases and other writings as shall be requisite to completely accomplish such adjustment, compromise, arbitration, appraisement and collection.

IN THE EVENT of a breach of any of the aforesaid covenants or agreements the whole of said indebtedness, including principal and all earned interest, shall, at the option of the legal....*holder*.....thereof, without notice, become immediately due and payable, and with interest thereon from the time of such breach, at....*seven*....per cent per annum, shall be recoverable by foreclosure hereof, or by suit at law, or both, the same as if all of said indebtedness had then been matured by express terms.

IT IS AGREED by the....*grantors*....that all expenses and disbursements, paid or incurred in behalf of....*complainant*....in connection with proceedings for the foreclosure hereof—including reasonable solicitor's fees, outlays for documentary evidence, stenographer's charges, cost of procuring or completing abstract showing the whole title to said premises—shall be paid by the....*grantors*....; and the like expenses and disbursements, occasioned by any suit or proceeding wherein the....*grantee*...., or any ....*holder*....of any part of said indebtedness, as such, may be....*a party*...., shall also be paid by the....*grantors*.... All such expenses and disbursements shall be an additional lien upon said premises, and included in any decree that may be rendered in such foreclosure proceedings; which proceeding shall not be dismissed, nor a release hereof given, until all such expenses and disbursements have been paid. The....*grantors waive*....all right to the possession of, and income from, said premises pending such foreclosure proceedings, and until the period of redemption from any sale thereunder expires, and....*agree*....that a Receiver shall be appointed to take possession or charge of said premises, and collect such income, and the same, less receivership expenses, pay to the person entitled to a deed under the certificate of sale, or in reduction of the redemption-money if said premises be redeemed.

IN THE EVENT of the inability of the....*grantee*....to act, or of ....*its*....refusal or failure to act, then....*James Warren*....of said ....*Marion*....County, is hereby appointed to be first successor in this trust, and invested with all the powers granted to said....*grantee*...., and if for any like cause said first successor fail or refuse to act, the person who shall then be the acting Recorder of Deeds of said....*Marion*.... County is hereby appointed to be second successor in this trust with like powers. And when all the aforesaid covenants and agreements are performed, the....*grantee*...., or....*its*....successor in trust, shall release

said premises to the party entitled, on receiving....*its*....reasonable charges.

WITNESS the....*hands and seals of the grantors*....this....*fourth*.... day of....*August*....*A. D*....*1914*....

FRANK WARD....[SEAL]
ALICE WARD.....[SEAL]
.....[SEAL]
.....[SEAL]

NOTE. For acknowledgment, see No. 69.

73. Warranty Deed.

THIS INDENTURE, Made this....*fifth*....day of....*April*....A. D. ....*1914*....between....*Albert Simpson*....of the....*City*....of....*Cedar Rapids*....in the County of....*Marion*....and State of....*Iowa, party*.... of the first part, and....*James Warren*....of the....*City*....of....*Rockford*....in the County of....*Winnebago*....and State of....*Illinois, party*....of the second part:

WITNESSETH, That the said....*party*....of the first part, for and in consideration of the sum of....*Six Thousand* (*$6,000.00*)....Dollars in hand paid by the said....*party*....of the second part, the receipt whereof is hereby acknowledged, and the said....*party*....of the second part forever released and discharged therefrom, ...*has*....granted, bargained, sold, remised, released, conveyed, aliened and confirmed, and by these presents ....*does*....grant, bargain, sell, remise, release, convey, alien and confirm, unto the said....*party*....of the second part, and to....*his*....heirs and assigns FOREVER, all the following described lot, piece, or parcel of land, situated in the County of....*Marion*....and State of....*Iowa*.... and known and described as follows, TO WIT: Lot....*Four* (*4*)...., Block....*Six* (*6*), *James' Addition*....to the....*City*....of....*Cedar Rapids*....

TOGETHER WITH ALL AND SINGULAR the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, claim or demand whatsoever, of the said....*party*....of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances: TO HAVE AND TO HOLD the said premises above bargained and described, with the appurtenances, unto the said....*party*....of the second part, ...*his*....heirs and assigns, FOREVER.

[1]AND the said....*Albert Simpson, party*....of the first part, for....*his*.... heirs, executors and administrators, ...*does*....covenant, grant, bargain and agree, to and with the said....*party*....of the second part,....*his*.... heirs and assigns, that at the time of the ensealing and delivery of these presents, ...*he was*....well seized of the premises above conveyed, as of

[1] Where conveyance is being made subject to a mortgage, substitute for paragraph above provisions in footnote on page 637.

a good, sure, perfect, absolute and indefeasible estate of inheritance in law, in fee simple, and....*has*....good right, full power, and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and encumbrances, of what kind or nature soever: and the above bargained premises, in the quiet and peaceable possession of the said....*party*....of the second part, ...*his*.... heirs and assigns, against all and every other person or persons lawfully claiming or to claim the whole or any part thereof; the said....*party*.... of the first part shall and will *WARRANT AND FOREVER DEFEND.*

AND the said....*party*....of the first part hereby expressly....*waives*.... and...*releases*...any and all right, benefit, privilege, advantage and exemption, under or by virtue of any and all Statutes of the State of....*Iowa*.... providing for the Exemption of Homesteads from sale on execution or otherwise.

IN WITNESS WHEREOF, the said....*party*....of the first part ....*has*....hereunto set....*his hand and seal*...., the day and year first above written.

ALBERT SIMPSON....[SEAL]
.....[SEAL]
.....[SEAL]
.....[SEAL]

Signed, Sealed and Delivered in the Presence of

....*HARRY WARREN*....
....*FRED SMITH*.....

NOTE. For acknowledgment, see No. 69.

This deed is subject, however, to a first mortgage for the principal sum of....*Three Thousand* (*$3,000.00*)....Dollars with interest at the rate of ....*six* (*6%*)....per cent per annum, given to one....*James Hardy*...., said mortgage falling due the....*tenth*....day of....*May*....A. D. ....*1916*.... And as part consideration for this deed, said....*grantee*.... hereby....*covenants and agrees*....for....*himself, his*....heirs, executors, administrators, or assigns, to pay the principal and any interest due since the....*tenth*....day of....*May*....A. D.....*1913*....and henceforth to become due procured by said mortgage, and that....*he*....will at all times hereafter warrant and defend the....*grantor, his*....estate and effects free and harmless from any claim or claims in connection therewith. But the above bargained premises free and clear from all former or other grants except said mortgage to....*James Hardy*....immediately above mentioned, and free from all other liens, taxes, assessments and encumbrances of any kind or nature whatsoever, in the quiet and peaceful possession of said ....*party*....of the second part, ...*his*....heirs and assigns, against all and every other person or persons lawfully claiming or to claim the whole or any part thereof; the said....*party*....of the first part shall and will *WARRANT AND FOREVER DEFEND.*

74. Warranty Deed, Statutory Form.

KNOW ALL MEN BY THESE PRESENTS: That....*I, Henry Jones, a single man*...., for and in consideration of the sum of....*One Hundred ($100.00)*.....Dollars, to.....*me*.....paid by.....*Frank Warren*....., do hereby grant, bargain, sell, and convey unto the said....*Frank Warren*...., and unto....*his*....heirs and assigns forever, the following described real estate, to wit: Lot....*Four (4)*...., Block....*Seven (7)*....of....*Howe's Addition*....to the....*City*....of....*Helena*...., in the County of ....*Green*....and State of....*Arkansas*...., to have and to hold the same unto the said....*Frank Warren*....and unto....*his*....heirs and assigns forever, with all appurtenances thereunto belonging, and....*I*....hereby covenant with said....*Frank Warren*....that....*I*....will forever warrant and defend the title to the said land against all claims whatsoever.

WITNESS....*my hand and seal*....on this....*tenth*....day of....*August*....A. D....*1914*....

HENRY JONES....[SEAL]

NOTE. Add acknowledgment by authorized official. This being a statutory form, the statutes of each particular state must be consulted to obtain the form there prevailing. It is better not to use this shorter form where the parties are not all resident in the state where the property to be conveyed is situated, and should never be used where the property is situated in more than one state, unless the statutory forms in use in all the states in question are the same.

75. Warranty Deed to Joint Tenants.

THIS INDENTURE WITNESSETH, That....*I, William Jones*...., of the....*City*....of....*Rockford*...., in the County of....*Winnebago*...., in the State of....*Illinois*...., for and in consideration of the sum of ....*Five Hundred ($500.00)*....Dollars, in hand paid, ...*convey*....and ....*warrant*....to....*Henry Smith and Helen Smith, his wife*...., not as tenants in common but as joint tenants, the following described real estate, to wit: Lot....*Two (2)*....in Block....*Three (3)*....of....*Parker's Addition*....to the....*City*....of....*Rockford*...., in the County of ....*Winnebago*....and State of....*Illinois*...., hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of....*Illinois*...., TO HAVE AND TO HOLD the above granted premises unto the said....*Henry Smith and Helen Smith, his wife*...., forever, not in tenancy in common but in joint tenancy.

IN WITNESS WHEREOF, ...*I have*....hereunto set....*my hand and seal*....the day and year first above written.

WILLIAM JONES....[SEAL]

NOTE. Acknowledgment before authorized official should accompany. See No. 69.

C. Easements.

76. Easement for Light.

INDENTURE, Made this....*ninth*....day of....*August*....A. D. ....*1914*....between....*Henry Jones, grantor*...., and....*William Smith, grantee*....:

WITNESSETH, That in consideration of the sum of....*One Hundred* (*$100.00*)....Dollars, paid by said....*grantee*....to said....*grantor*...., receipt whereof is hereby acknowledged, the said....*grantor*....hereby ....*grants*....to the said....*grantee*...., and....*his*....heirs, full and free right to the uninterrupted access and enjoyment of light from and across that piece of land situated in the....*City*....of....*Chicago*....and County of....*Cook*...., known more particularly as Lot....*Three* (*3*)...., Block....*Four* (*4*), *Parker's Re-Subdivision*....to the....*City*....of ....*Evanston*...., to the existing windows of the dwelling house recently erected upon Lot....*Two* (*2*)...., Block....*Four* (*4*), *Parker's Re-Subdivision*....to the....*City*....of....*Evanston*...., adjoining said land of the said....*grantor*....on the....*South Side*....thereof, the whole of the said easement unto the said....*grantee, his*....heirs and assigns.

IN WITNESS WHEREUNTO, the parties have set their hands and seals this....*ninth*....day of....*August*....A. D....*1914*....

HENRY JONES .....[SEAL]
WILLIAM SMITH....[SEAL]

Signed, Sealed and Delivered in the Presence of
....*ROBERT HART*....
....*JAMES LEA*.....

77. Easement for Party-Wall.

THIS AGREEMENT, Made this....*third*....day of....*April*....A. D. ....*1914*....between....*Frank James, party*....of the first part, and ....*Henry Towle, party*....of the second part:

WITNESSETH, That whereas, the said....*Frank James, party*....of the first part,....*is*....seized or possessed of a certain lot or piece of ground in the....*City*....of....*Chicago*...., County of....*Cook*....and State of ....*Illinois*...., and described as follows: Lot....*Three* (*3*)...., Block ....*Four* (*4*), *Powell's Subdivision*....to the....*City*....of....*Chicago*...., otherwise known as Number....*238 N. Leavitt Street*....in said....*City*....; and whereas, the said....*Henry Towle, party*....of the second part, ...*is*....seized or possessed of a certain lot or piece of ground in said ....*City*....and described as follows: Lot....*Four* (*4*)...., Block .....*Four* (*4*), *Powell's Subdivision*.....to the.....*City*.....of.....*Chicago*...., otherwise known as Number....*240 N. Leavitt Street*....in said ....*City*...., which is adjoining and contiguous to the said before mentioned and described lot of ground of the said....*party*....of the first part; and whereas, it is the wish of the said....*party*....of the first part and the said....*party*....of the second part, that a party-wall....*thirty-six* (*36*) *inches*....in thickness, shall be built between them, one half of which

is to stand on the said lot of the said....*party*....of the first part, and the other half on the said lot of the said....*party*....of the second part; and whereas, it is the intention of the said....*party*....of the first part to erect a building on....*his*....said lot above described, the....*east*.... wall of which is to be used as a party-wall by the said parties of the first and second parts.

NOW, THEREFORE, THIS INDENTURE WITNESSETH: That it is hereby mutually agreed by the said parties, in consideration of the premises, that the said....*party*....of the first part may so build and erect a party-wall, ...*thirty-six* (*36*) *inches*....in thickness, on the....*east*....side of the said lot of the....*party*....of the first part, that the center of said party-wall shall be on the division line of the said lots hereinbefore mentioned, of the said parties of the first and second parts, respectively.

AND THIS INDENTURE FURTHER WITNESSETH: That the said ....*party*....of the first part....*does*....hereby covenant, promise, grant and agree that the said....*party*....of the second part, ...*his*....heirs and assigns, shall and may at all times hereafter, have the full and free liberty and privilege of joining to and using the said partition above mentioned, as well below and above the surface of the ground and along the whole length or any part thereof, any building which....*he*....or they or any of them may desire or have occasion to erect on the said lot of the said....*party*....of the second part, and to sink the joists of such building or buildings into the said partition wall to the depth of....*thirty* (*30*) *inches*...., and no further; Provided, always, nevertheless, and on this express condition, that the said....*party*....of the second part, ...*his*.... heirs and assigns, as aforesaid, before proceeding to join any building to the said partition wall, and before making any use thereof, or breaking into the same, shall pay or secure to be paid unto the said....*party*....of the first part, ...*his*....heirs and assigns aforesaid, the full moiety or one-half part of the value of the said party-wall, or so much thereof as shall be joined to or used as aforesaid, which value shall be the cost price at the time when such wall is to be used by the said....*party*....of the second part, as fixed, estimated and assessed by....*Albert Hayes, James Frederick and William Gray*...., who are known by both parties hereto, and in case of the death or removal of any of the above from the State of ....*Illinois*...., the remaining two shall at once choose a successor who shall act in conjunction with them.

AND IT IS FURTHER AGREED by and between the said parties, that if either of the above parties, their or either of their heirs and assigns, shall at any time hereafter desire to build a barn or extend the wall hereinbefore mentioned, the party so building may build and erect such wall or extension in the same manner as above specified, and the other party shall have the same liberty and privilege of joining and using such wall or walls so built and erected as aforesaid, on complying with the same conditions as are hereinbefore required by the said....*party*....of the first part, as the manner of joining to the wall above mentioned and paying for the same.

AND THE SAID PARTIES FURTHER AGREE AND COVENANT that, if it shall hereafter become necessary to repair or rebuild the whole or

any portion of the said party-wall or walls, the expense of such repairing or re-building shall be borne equally by them, their respective heirs and assigns, as to so much and such portion of said walls as the said parties, their heirs and assigns, shall or may use jointly.

IT IS FURTHER MUTUALLY AGREED between the said parties, that this agreement shall be perpetual, and at all times be construed as a covenant running with the land.

IN WITNESS WHEREOF, the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

Signed, Sealed and Delivered in the Presence of
.....*JAMES VEEDER*.....
.....*FRED SIMPSON*.....

FRANK JAMES.....[SEAL]
HENRY TOWLE.....[SEAL]
.....[SEAL]
.....[SEAL]

NOTE. Acknowledgement before authorized official should accompany. See form No. 69.

78. Easement for Right of Way.

INDENTURE, Made this....*ninth*....day of....*August*....A. D. ....*1914*...., between....*Henry Jones, grantor*..., and...*William Smith, grantee*....:

WITNESSETH, That in consideration of the sum of....*Five Hundred* (*$500.00*)....Dollars, now paid by the said....*grantee*....to the said ....*grantor*...., the said....*grantor*....hereby....*grants*....to the said ....*grantee, his*....heirs and assigns, full and free right and liberty for ....*him*....and them, ...*his*....and their tenants, servants and licensees, in common with all other persons having the like right at all times hereafter, on foot, or on horseback, or in vehicles, but not with cattle, sheep, pigs or other animals, to pass and repass along....*a certain private road leading from the farm house now occupied by grantee*...., which is located on the....*Northwest One-Quarter* (*N. W.* ¼)...., Section....*Twenty* (*20*)...., Township....*Three* (*3*), *North*...., Range....*Two* (*2*), *East*....of the ....*Third*....Principal Meridian, to the....*highway north of said farm house*...., all of which....*road*....belongs to said....*grantor*....and is part of the.... *Southwest One-Quarter* (*S. W.* ¼)..., Section....*Twenty* (*20*)...., Township....*Three* (*3*), *North*...., Range....*Two* (*2*), *East*.... of the....*Third*....Principal Meridian. Said....*grantee is*....to have and to hold said....*private road*....for all purposes connected with the use and enjoyment of said....*grantee's*....premises as a single private dwelling house but not for any other purpose. To hold the said right of way hereby granted unto the said....*grantee*....and....*his*....heirs as appurtenant to said dwelling house and grounds.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and date aforesaid.

HENRY JONES.....[SEAL]
WILLIAM SMITH....[SEAL]

Signed, Sealed and Delivered in the Presence of:
....*ROBERT HART*....
....*JAMES LEA*.....

79. Easement for Water Rights.

INDENTURE, Made this.....*ninth*.....day of.....*August*.....A. D. ....*1914*...., between....*Oscar Jones*....and....*Henry Smith*.... WHEREAS, said....*Oscar Jones is*....the....*owner*....in fee simple of Lot....*Three* (*3*)...., Block....*Two* (*2*), *Parker's Re-Subdivision*.... to the....*City*....of....*Evanston*...., in the County of....*Cook*...., State of....*Illinois*...., on which....*he has sunk a well*...., and ....*has*....agreed with....*Henry Smith*....to sell said....*Henry Smith*....the easement hereinafter described:

NOW, THIS INDENTURE WITNESSETH AS FOLLOWS: In consideration of....*Three Hundred* (*$300.00*)....Dollars, paid by the said ....*Henry Smith*...., the said....*Oscar Jones*....hereby....*grants*.... unto said....*Henry Smith, his*....heirs and assigns, full and free right and authority by....*himself*....or themselves, ...*his*....or their servants or agents to enter upon the lot above described and to pass and repass by a footpath to and from said....*well and to take water from the well pump for all domestic purposes*...., to the use of said....*Henry Smith, his*.... heirs and assigns, forever; or at the option of said....*Henry Smith, his*.... heirs or assigns, ...*he*....or they have the right and authority....*to lay a pipe from said well to the house on the land of said adjoining owner and by a pump or other means to draw water from said well for all domestic purposes in common with the well owner, his*....heirs and assigns. The said....*Oscar Jones*....hereby....*covenants*....with the said....*Henry Smith, his*....heirs and assigns, that....*he*....will....*keep the well in good order and free from contamination*....

IT IS UNDERSTOOD AND AGREED that should either of the parties hereto part with said lots above described, the easement herein described and the burdens and profits of said easement shall in no wise depart from the lots aforesaid and they shall in no wise be separable from the lots aforesaid.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and date first above written.

OSCAR JONES.....[SEAL]
HENRY SMITH....[SEAL]

Signed, Sealed and Delivered in the Presence of:
....*ALBERT WARD*....

D. Husband and Wife, Between.

80. Marriage Settlement.

INDENTURE, Made this.....*ninth*.....day of.....*August*.....A. D. ....*1914*...., between....*Henry Mills*...., of the first part, and....*Helen Smith*...., of the second part, and....*Albert Jones, trustee*...., of the third part.

WHEREAS, a marriage is expected to be shortly solemnized between the parties of the first and second parts, and upon the engagement to enter into such marriage the said....*Henry Mills*...., in consideration of the sum

of....*Twenty-five* (*$25.00*)....Dollars, to him by the said....*trustee*.... paid, did covenant and agree to and with the said....*trustee*....that he would transfer, set over, and well and sufficiently convey unto the said ....*trustee*....all and singular....*the bonds, stocks and policies of life assurance more particularly set forth and mentioned in the schedule hereto annexed, and the real estate, also more fully set out in said schedule*....; and also that he would execute a bond to the said....*trustee*....in the penal sum of....*Ten Thousand* (*$10,000.00*)....Dollars, conditioned for the payment of.....*Seven Thousand* (*$7,000.00*).....Dollars, on or before the ....*tenth*....day of....*December*....A. D....*1914*...., and to secure the same would convey by way of mortgage to the said....*trustee*....all of Lots....*One* (*1*), *Two* (*2*) *and Three* (*3*)....of Block....*Two* (*2*)....of ....*Edgar's Addition*....to the....*Village*....of....*La Grange*....in the County of....*Cook*....in the State of....*Illinois*....:

NOW, THEREFORE, in consideration of the said intended marriage and of the said sum of....*Twenty-five* (*$25.00*)....Dollars, to him paid as aforesaid, the said party of the first part, by these presents, doth assign, transfer, set over and convey unto the said....*trustee all the bonds, stocks, policies of assurance and other choses in action set forth in said schedule before mentioned*...., and also doth by these presents give, grant, release and forever quitclaim unto the said....*trustee all real estate in said schedule*...., and also by way of mortgage, all and singular....*the lots above described*...., together with all and singular the rights, privileges and appurtenances to the said property and each and every part thereof appertaining or in any way belonging:

TO HAVE AND TO HOLD said property which shall be hereinafter designated as the "settled property" to the said....*trustee and his*.... survivor or successor in trust. In trust, nevertheless, to and for the following uses, trusts, intents and purposes and for no other whatsoever, that is to say, until such intended marriage is duly had and solemnized, to the use of said party of the first part and according to the nature and kind of the said settled property to his heirs, executors, administrators and assigns; and from and immediately after such intended marriage, in trust to and for the sole, separate and exclusive use of said party of the second part, free from the liabilities or control of said party of the first part and for and during the term of their joint lives, respectively, her receipt for the income, dividends or interest or other proceeds when actually had shall be a sufficient discharge thereof to the said....*trustee*....; and from and after the death of the said party of the second part, the said party of the first part surviving her, then in trust for the use, benefit and behalf of him, the said party of the first part, until he shall either die or be judged or declared a bankrupt, or enter into a compromise with his creditors for the payment of his debts which he may now or at any time hereafter owe, or until any other act or event shall happen either by or through his own act or default or that of any other person or persons whomsoever, or by operation of law whereby the said settled property would vest or become liable to vest in any person other than the said party of the first part; and from and immediately after the death of said party of the first part, or the

sooner determination of his interest in said settled property, or any part thereof, he having survived his wife, then in trust to keep the said settled property invested and the annual proceeds and income arising therefrom, to collect and apply to the support, maintenance and education of the child or children of the said parties of the first and second parts living at the time of the determination of the interest of said party of the first part in the settled property, or which may come into existence thereafter, until the youngest child shall become twenty-one years of age, in such share and proportions as the said party of the first part from time to time and at all times during his life interest or by his last will and testament shall appoint. But if said party of the second part shall have died before said party of the first part and there shall be no child or children, then in trust to hold said settled property for the use and benefit of such person or persons and upon such conditions as said party of the first part shall in writing appoint.

BUT in case the said party of the second part shall survive the said party of the first part, then in trust to convey and invest the settled property in the executor or executors of the last will and testament of said party of the first part for the use and benefit of such person or persons as he may thereby appoint, subject to the limitations and provisions therein contained: PROVIDED ALWAYS, nevertheless, that the said settled property shall in no way be liable for the debts which he, the said party of the first part, may owe at the time of his death, and in case of the failure of the party of the first part to make such appointment, in case he leaves issue surviving him, then to keep all the settled property invested and to pay the said party of the second part the income arising therefrom, to be used by her as she shall deem proper for and during her joint life and the longest liver of such issue, and if she, the said party of the second part, shall survive all such issue, then to pay to her the whole income and to convey to her the principal upon the conditions and provisions hereinafter provided in case he, the said party of the first part, shall leave no such issue. And from and immediately after the death of said party of the second part, issue of said party of the first part surviving her, then to keep all and singular the said settled property invested until the youngest child of the said party of the first part shall become twenty-one years of age and then to divide the income equally among them; and upon the happening of such last said event, then to convey or divide the principal of the said property to and among the issue of the said party of the first part living at the time of such division, the issue of any deceased child taking by representation. But in case the said party of the first part shall leave the said party of the second part surviving him, and no issue living at the time of his death, or in case he leaves such issue and the longest liver of such issue pre-deceases said party of the second part, then from and immediately after the death of said party of the first part or from and immediately after the death in the lifetime of the said party of the second part of the longest liver of such issue, in trust to convey by proper deed one moiety of the said settled property unto the said party of the second part for her own use absolutely, and the income of the other moiety to pay to her during her life, and after her death to convey this last moiety unto and among the next of kin of the said

party of the first part who may be living at the death of said party of the second part.

In case of the death or refusal to act of said....*trustee*...., then the parties of the first and second parts shall agree on the appointment of ....*his*....successor, and in case they cannot agree application may be made to the....*Probate*....Court Judge for the County of....*Cook*....in the State of....*Illinois*....to appoint such....*trustee*.... Said....*trustee*.... shall have full power to buy, sell and convey said property and to change the manner of holding of said property. Said party of the first part hereby covenants and agrees to keep all of said settled property of an insurable nature fully insured with a reputable company.

IN WITNESS WHEREUNTO, the parties have hereunto set their hands and seals the day and date first above written.

HENRY MILLS.....[SEAL]
Witnesses: *HELEN SMITH*.....[SEAL]
....*HARRY WOOD*.... *ALBERT JONES*.....[SEAL]
....*JAMES HENRY*... .....[SEAL]

81. Articles of Separation.

THIS INDENTURE, Made this....*ninth*....day of....*August*....A. D. ....*1914*...., between....*Henry Smith*...., of....*Chicago, Illinois*...., of the first part, and....*Maud Allen Smith*...., his wife, of the second part, and....*Frank Allen*...., as....*trustee*....of the said....*Maud Allen Smith*...., of the third part:

WHEREAS, divers disputes and unhappy differences have arisen between said party of the first part and his wife, for which reason they have consented and agreed to live separate and apart from each other during their natural lives, and are at the present time so living: *THEREFORE, THIS INDENTURE WITNESSETH:*

1. It shall be lawful for the said wife to reside at such place or places and with such relations, friends and other persons, except immoral persons, as she shall from time to time see fit; and exercise, carry on, or conduct any trade, business, or employment which she shall see fit, for her own and separate use and benefit, without any manner of control, restraint, or interference, by her said husband, or through his means or procurement, and in all respects as if she were unmarried.

2. As long as this agreement is duly performed on the part of the said husband, she will not contract any debts or liabilities whatever for which the said husband shall or may become personally liable; and neither she, nor any other person or persons, on her behalf or with her authority, consent, or procurement, shall or will institute any action or civil process against said husband, either for divorce, judicial separation, alimony, or for any other purpose whatever, except for personal injuries or wrongs.

3. The personal receipts of said wife shall be effectual discharges as well for the respective sums which shall be paid to her by virtue hereof as for any other sum or sums of money, articles or things which she may become entitled to or receive.

4. The said husband, in consideration of the said arrangement, hereby

sooner determination of his interest in said settled property, or any part thereof, he having survived his wife, then in trust to keep the said settled property invested and the annual proceeds and income arising therefrom, to collect and apply to the support, maintenance and education of the child or children of the said parties of the first and second parts living at the time of the determination of the interest of said party of the first part in the settled property, or which may come into existence thereafter, until the youngest child shall become twenty-one years of age, in such share and proportions as the said party of the first part from time to time and at all times during his life interest or by his last will and testament shall appoint. But if said party of the second part shall have died before said party of the first part and there shall be no child or children, then in trust to hold said settled property for the use and benefit of such person or persons and upon such conditions as said party of the first part shall in writing appoint.

BUT in case the said party of the second part shall survive the said party of the first part, then in trust to convey and invest the settled property in the executor or executors of the last will and testament of said party of the first part for the use and benefit of such person or persons as he may thereby appoint, subject to the limitations and provisions therein contained: PROVIDED ALWAYS, nevertheless, that the said settled property shall in no way be liable for the debts which he, the said party of the first part, may owe at the time of his death, and in case of the failure of the party of the first part to make such appointment, in case he leaves issue surviving him, then to keep all the settled property invested and to pay the said party of the second part the income arising therefrom, to be used by her as she shall deem proper for and during her joint life and the longest liver of such issue, and if she, the said party of the second part, shall survive all such issue, then to pay to her the whole income and to convey to her the principal upon the conditions and provisions hereinafter provided in case he, the said party of the first part, shall leave no such issue. And from and immediately after the death of said party of the second part, issue of said party of the first part surviving her, then to keep all and singular the said settled property invested until the youngest child of the said party of the first part shall become twenty-one years of age and then to divide the income equally among them; and upon the happening of such last said event, then to convey or divide the principal of the said property to and among the issue of the said party of the first part living at the time of such division, the issue of any deceased child taking by representation. But in case the said party of the first part shall leave the said party of the second part surviving him, and no issue living at the time of his death, or in case he leaves such issue and the longest liver of such issue pre-deceases said party of the second part, then from and immediately after the death of said party of the first part or from and immediately after the death in the lifetime of the said party of the second part of the longest liver of such issue, in trust to convey by proper deed one moiety of the said settled property unto the said party of the second part for her own use absolutely, and the income of the other moiety to pay to her during her life, and after her death to convey this last moiety unto and among the next of kin of the said

party of the first part who may be living at the death of said party of the second part.

In case of the death or refusal to act of said....*trustee*...., then the parties of the first and second parts shall agree on the appointment of ....*his*....successor, and in case they cannot agree application may be made to the....*Probate*....Court Judge for the County of....*Cook*....in the State of....*Illinois*....to appoint such....*trustee*.... Said....*trustee*.... shall have full power to buy, sell and convey said property and to change the manner of holding of said property. Said party of the first part hereby covenants and agrees to keep all of said settled property of an insurable nature fully insured with a reputable company.

IN WITNESS WHEREUNTO, the parties have hereunto set their hands and seals the day and date first above written.

HENRY MILLS.....[SEAL]
HELEN SMITH.....[SEAL]
ALBERT JONES.....[SEAL]
.....[SEAL]

Witnesses:
....*HARRY WOOD*....
....*JAMES HENRY*...

81. Articles of Separation.

THIS INDENTURE, Made this....*ninth*....day of....*August*....A. D. ....*1914*...., between....*Henry Smith*...., of....*Chicago, Illinois*...., of the first part, and....*Maud Allen Smith*...., his wife, of the second part, and....*Frank Allen*...., as....*trustee*....of the said....*Maud Allen Smith*...., of the third part:

WHEREAS, divers disputes and unhappy differences have arisen between said party of the first part and his wife, for which reason they have consented and agreed to live separate and apart from each other during their natural lives, and are at the present time so living: *THEREFORE, THIS INDENTURE WITNESSETH:*

1. It shall be lawful for the said wife to reside at such place or places and with such relations, friends and other persons, except immoral persons, as she shall from time to time see fit; and exercise, carry on, or conduct any trade, business, or employment which she shall see fit, for her own and separate use and benefit, without any manner of control, restraint, or interference, by her said husband, or through his means or procurement, and in all respects as if she were unmarried.

2. As long as this agreement is duly performed on the part of the said husband, she will not contract any debts or liabilities whatever for which the said husband shall or may become personally liable; and neither she, nor any other person or persons, on her behalf or with her authority, consent, or procurement, shall or will institute any action or civil process against said husband, either for divorce, judicial separation, alimony, or for any other purpose whatever, except for personal injuries or wrongs.

3. The personal receipts of said wife shall be effectual discharges as well for the respective sums which shall be paid to her by virtue hereof as for any other sum or sums of money, articles or things which she may become entitled to or receive.

4. The said husband, in consideration of the said arrangement, hereby

further agrees with the said....*trustee*....that so long as the said separation continues and as the said wife shall live chaste, he will not in any manner or at any time molest or interfere with said wife or receive or claim any money not his own which she may earn or be or hereafter become possessed of.

5. Said wife may retain, use and enjoy all her own property, and sell and dispose of it, and give or bequeath it or any parts of it in all respects as if she were unmarried.

6. Said husband will pay or cause to be paid in advance unto the ....*trustee*....during the life of and for the use and benefit of said wife, if she shall so long continue to live chaste and separate from him as aforesaid, the full sum of....*Fifteen ($15.00)*....Dollars, weekly and every week for her maintenance, clothing, and other necessaries, and for her own sole use and benefit, and will make the first payment thereof on the....*first*.... day of....*September next*....

AND IT IS FURTHER MUTUALLY STIPULATED AND AGREED that if said wife, or any person or persons on her behalf, shall violate any of the stipulations or agreements on her part herein contained, then this agreement shall, at the option of said husband, thenceforth become void; without prejudice, however, to any right which shall have then accrued to either party under or by virtue hereof.

IN WITNESS WHEREUNTO, the parties have set their hands and seals the day and date first above written.

HENRY SMITH.....[SEAL]
MAUD ALLEN SMITH....[SEAL]
FRANK ALLEN.....[SEAL]

E. (a) Landlord and Tenant—Leases.

82. Apartment Lease—Short Form.

THIS AGREEMENT, Made the....*fourth*....day of....*April*....A. D. ....*1914*...., between....*Amos Weary, 1231 N. Paulina Street, Chicago, Illinois*...., of the first part, and....*Frank Hardy*...., of the second part: · *WITNESSETH,* That the said....*party*....of the first part....*has*.... agreed to let, and hereby....*does*....let to the said....*party*....of the second part, and the said....*party*....of the second part....*has*....agreed to take, and hereby....*does*....take from the said....*party*....of the first part, ...*the apartment consisting of five (5) rooms on the second floor of the building numbered 922 East Howard Avenue*....in the....*City*....of ....*Chicago*...., together with the free use of the front entrance, the hall, staircase, and passageways leading to said rooms, the water closet and bathrooms, and part of the cellar for the storage of fuel and a storeroom in the basement for other purposes, for the term of....*one year*...., to commence on the....*first*....day of....*May*....A. D....*1914*...., and to end on the ....*thirtieth*....day of....*April*....A. D....*1915*....

AND the said....*party*....of the second part hereby....*covenants and agrees*....to pay unto the said....*party*....of the first part, the....*annual*....rent or sum of....*Six Hundred ($600.00)*....Dollars, payable on

the....*first*....day of each month in advance in installments of....*Fifty* (*$50.00*)....Dollars monthly.

AND to quit and surrender the premises, at the expiration of the said term, in as good state and condition as they were in at the commencement of the term, reasonable use and wear thereof and damages by the elements excepted.

AND the said....*party*....of the second part further....*covenants*.... that....*he*....will not assign this lease, or let, or underlet the whole or any part of the said premises, or make any alteration therein without the written consent of the said....*party*....of the first part, under the penalty of forfeiture and damages; and that....*he*....will not occupy or use the said premises, nor permit the same to be occupied or used for any business deemed extra-hazardous on account of fire or otherwise, without the like consent, under the like penalty.

AND the said....*party*....of the second part further....*covenants*.... that....*he*....will permit the said....*party*....of the first part, or ....*his*....agent, to show the premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term, will permit the usual notice of "to let" or "for sale" to be placed upon the walls or doors of said premises, and remain thereon without hindrance or molestation.

AND ALSO, that if the said premises, or any part thereof, shall become vacant during the said term, the said....*party*....of the first part, or ....*his*....representative, may re-enter the same, either by force or otherwise, without being liable to any prosecution therefor; and re-let the said premises as the agent of the said....*party*....of the second part, and receive the rent thereof, applying the same first to the payment of such expenses as....*he*....may be put to in re-entering, and then to the payment of the rent due by these presents; and the balance (if any) to be paid over to the said....*party*....of the second part, who shall remain liable for any deficiency.

AND the said....*party*....of the second part hereby....*covenants*.... that if any default be made in the payment of the said rent, or any part thereof, at the times above specified, or if default be made in the performance of any of the covenants or agreements herein contained, the said hiring, and the relation of landlord and tenant, at the option of the said ....*party*....of the first part, shall wholly cease and determine; and the said....*party*....of the first part shall and may re-enter the said premises and remove all persons therefrom; and the said....*party*....of the second part hereby expressly....*waives*....the service of any notice in writing of intention to re-enter, notice to terminate the tenancy, notice to quit or demand for possession.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

AMOS WEARY.....[SEAL]
FRANK HARDY...[SEAL]

Sealed and Delivered in the Presence of:
....*JAMES HERRON*....

83. Ground Lease.

THIS INDENTURE, Made this....*twentieth*....day of.....*May*..... A. D....*1914*...., between....*James Smythe*...., of....*La Grange*...., in the County of....*Cook*....and State of....*Illinois, party*....of the first part, and....*Frederick Warner*....of....*Berwyn*...., in the County of ....*Cook*....and State of....*Illinois, party*....of the second part:

WITNESSETH, That the said....*party*....of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said....*party*....of the second part, ...*his*.... executors, administrators, and assigns, ...*has*....demised and leased to the said....*party*....of the second part, all those premises situate, lying, and being in....*La Grange*...., in the County of....*Cook*....and State of ....*Illinois*...., known and described as follows, to wit: Lots....*Five (5) and Six (6)*....of Block....*Two (2)*....of....*plat of the original village*....of....*La Grange*....,

TO HAVE AND TO HOLD the above described premises, with the appurtenances, unto the said....*party*....of the second part, ...*his*.... executors, administrators, and assigns, from the....*twentieth*....day of ....*May*....A. D....*1914*...., for, and during, and until the....*twentieth*....day of....*May*....A. D.....*2013*....

AND the said....*party*....of the second part, in consideration of the leasing of the premises aforesaid, by the said....*party*....of the first part to the said....*party*....of the second part, ...*does*....covenant and agree with said....*party*....of the first part, ...*his*....heirs, administrators, and assigns, to pay the said....*party*....of the first part, as annual rent for said demised premises, at the office of....*La Grange State Bank*....in ....*La Grange*....the sum of....*One Thousand ($1,000.00)*....Dollars.

IT IS FURTHER COVENANTED AND AGREED by the said ....*party*....of the second part, that....*he*....will pay or cause to be paid all water rates, and all taxes and assessments that may be laid, charged or assessed on said demised premises, pending the existence of this lease, or if at any time after any tax, assessment, or water rate shall have become due or payable, the....*party*....of the second part, or....*his*....legal representatives, shall neglect to pay such water rates, tax or assessment, it may be lawful for the....*party*....of the first part to pay the same at any time thereafter, and the amount of any and all such payments so made by the....*party*....of the first part shall be deemed and taken, and are hereby declared to be so much additional and further rent for the above demised premises due from and payable by the....*party*....of the second part; and may be collected in the same manner, by distress or otherwise, as is hereinafter provided for the collection of other rents to grow due thereon.

AND IT IS EXPRESSLY UNDERSTOOD AND AGREED by the said ....*party*....of the second part hereto, for....*his*....heirs, executors, administrators, and assigns, that the whole amount of rent reserved, and agreed to be paid for said above demised premises, and each and every installment thereof, shall be and is hereby declared to be a valid and first

lien upon any and all buildings and improvements on said premises, or that may at any time be erected, placed or put on said premises by said ....*party*....of the second part, ...*his*....heirs, executors, and administrators or assigns, and upon....*his*....or their interests in this lease, and the premises hereby demised; and that whenever, and as often as any installment of rent, or any other amount above declared to be deemed and taken as rent, shall become due and remain unpaid for one day after the same becomes due and payable, said....*party*....of the first part, ...*his*.... heirs, executors, administrators, agent, attorney, or assigns, may sell at public auction, to the highest bidder for cash, after having first given ten days' notice of the time and place of such sale in some newspaper published in....*Cook*....County, all the buildings and improvements on said premises, and all the right, title, and interest acquired by said ....*party*....of the second part under this lease, to the premises herein described, and as the attorney of said....*party*....of the second part hereby irrevocably constituted, may make to the purchaser or purchasers thereof a suitable and proper transfer, Bill of Sale, or Deed of the same, and out of the proceeds arising from such sale, after first paying all costs and expenses of such sale, including commissions and attorney's fees, retain to....*himself*....the whole amount due on said lease, up to the date of said sale, rendering the surplus (if any) to said....*party*....of the second part, ...*his*....heirs, executors, administrators, agent, attorney, or assigns, which sale shall be a perpetual bar to and against all rights and equities of said....*party*....of the second part, ...*his*....heirs and assigns in and to the property sold.

AND the....*party*....of the second part further....*covenants*....with the....*party*....of the first part, that....*he*....will keep said demised premises in a clean and wholesome condition, in accordance with the ordinances of the city, and directions of the Health Officers, and that, at the expiration of the time in this lease mentioned, ...*he*....will yield up said premises to the....*party*....of the first part, in as good condition as when the same were entered upon by the....*party*....of the second part, loss by fire, or inevitable accident, and ordinary wear excepted.

IT IS FURTHER AGREED by the....*party*....of the second part, that neither.....*he*.....nor.....*his*.....legal representatives will underlet said premises, or any part thereof, or assign this lease, without the written assent of said....*party*....of the first part first had and obtained thereto, nor use, or suffer them to be used, for....*selling spirituous liquors*....or for any other purposes calculated to injure the reputation of the premises, or of the neighborhood, or to impair the value of the surrounding neighborhood property for present use or otherwise.

IT IS EXPRESSLY UNDERSTOOD AND AGREED by and between the parties aforesaid, that if the rent above reserved, or any part thereof, shall be behind or unpaid, on the day of payment, wherein it ought to be paid, as aforesaid, or if default shall be made in any of the covenants herein contained to be kept by the....*party*....of the second part, ...*his*.... executors, administrators, or assigns, it shall or may be lawful for the ....*party*....of the first part, or....*his*....heirs, executors, administrators,

agent, attorney, or assigns, at....*his*....election, to declare said term ended, and into the said demised premises, or any part thereof, either with or without process of law, to re-enter, and the....*party*....of the second part, or any other person or persons occupying, in or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy, as in....*his*....first and former estate; and to distrain for any rent that may be due thereon, upon any property belonging to the....*party*....of the second part, whether the same be exempt from execution and distress by law or not; and the....*party*.... of the second part, in that case, hereby....*waives*....all legal rights which ....*he*....now....*has*....or may have, to hold or retain any such property under any exemption laws now in force in this State, or in any other way; meaning and intending hereby to give the....*party*....of the first part ....*his*....heirs, executors, administrators, agent, attorney or assigns, a valid and first lien upon any and all the goods, chattels, or other property belonging to the....*party*....of the second part, as security for the payment of said rent, in manner aforesaid, anything hereinbefore contained to the contrary notwithstanding. And if at any time said term shall be ended at such election of said....*party*....of the first part, ...*his*....heirs, executors, administrators, agent, attorney or assigns, as aforesaid, or in any other way, the....*party*....of the second part....*does*....hereby covenant and agree to surrender and deliver up said above described premises and property, peaceably, to the said....*party*....of first part, ...*his*....heirs, executors, administrators, agent, attorney or assigns, immediately upon the determination of said term as aforesaid; and if....*he*....shall remain in possession of the same one day after notice of such default, or after the termination of this Lease, in any of the ways above named, ...*he*.... shall be deemed guilty of a forcible detainer of the premises under the statute, and shall be subject to all the conditions and provisions above named, and to eviction and removal, forcibly or otherwise, with or without process of law, as above stated.

AND IT IS FURTHER UNDERSTOOD AND AGREED by the said ....*party*....of the second part, that neither the right given in this Lease to said....*party*....of the first part, to collect the rent that may be due under the terms of this Lease by sale, or any proceedings under the same, shall in any way affect the right of said....*party*....of the first part to declare this Lease void and the term hereby created ended, as above provided upon default made by said....*party*....of the second part.

AND the said....*party*....of the second part hereby....*waives his*.... right to any notice from said....*party*....of the first part, of....*his*.... election to declare this Lease at an end, under any of its provisions, or any demand for the payment of rent, or the possession of premises leased herein; but the simple fact of the non-payment of the rent reserved shall constitute a forcible detainer as aforesaid.

THE said....*party*....of the second part further....*agrees*....not to remove any buildings or other improvements from said premises, without written consent of said....*party*....of the first part, and that the said second....*party*....shall pay and discharge all costs and attorneys' fees

and expenses that shall arise from enforcing the covenants of this indenture by the....*party*....of the first part.

IT IS FURTHER UNDERSTOOD AND AGREED that all the conditions and covenants contained in this Lease shall be binding upon the heirs, executors, administrators and assigns of the parties to these presents, respectively.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

JAMES SMYTHE.....[SEAL]
FREDERICK WARNER....[SEAL]

In Presence of:
....*ALBERT JENNINGS*....

84. Farm Lease with Mortgage Covenants.

THIS INDENTURE, Made this....*fourth*....day of....*February*.... A. D....*1914*....between....*Frank Jones*....of the first part, and....*Roy Gray*....of the second part:

WITNESSETH, That the said....*party*....of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said....*party*....of the second part, ...*his*....executors, administrators, and assigns, ...*has*....demised and leased to the said....*party*....of the second part all those premises situate, lying and being near the....*City*....of....*Freeport*....in the County of ....*Whiteside*....in the State of....*Illinois*...., known and described as follows, to-wit: ....*Northwest* (*N. W.*) *One-Quarter* (¼)....Section ....*Three* (*3*)....Township....*Six* (*6*) *North*....Range....*Five* (*5*) *East*....of the....*Third*....Principal Meridian.

TO HAVE AND TO HOLD the said above described premises, with the appurtenances, unto the said....*party*....of the second part, ...*his*.... executors, administrators, and assigns, from the....*first*....day of ....*March*....A. D....*1914*...., for and during and until the....*twenty-eighth*....day of....*February*....A. D....*1915*.... And the said ....*party*....of the second part, in consideration of the leasing of the premises aforesaid, by the said....*party*....of the first part to the said ....*party*....of the second part, ...*does*....covenant and agree with the said....*party*....of the first part, ...*his*....heirs, executors, administrators, and assigns, to pay the said....*party*....of the first part, as rent for said demised premises, [1](....*one-third*....part of the crops so raised on said lands, and further....*agrees*....to haul such share of said crops as is due said....*party*....of the first part to market on or before....*December first*....A. D.....*1914*....unless said....*party*....of the first part shall set a later date). And in default of such delivery said....*party*....of the second part....*agrees*....to pay....*One Thousand* (*$1000.00*)....Dollars by ....*January first*....A. D....*1915*....

[1] Where money rent is paid, provision therefor may be inserted in the parentheses, instead of share of crops.

AND IT IS FURTHER AGREED by the said....*party*....of the second part, in consideration of the leasing of the premises aforesaid, that the said ....*party*....of the second part shall and will pay, or cause to be paid, promptly, as soon as the same becomes due, all assessments for water-rents that may be levied upon said demised premises during the continuance of this lease, and save said premises and the....*party*....of the first part harmless from all charges and expenses connected with the supply of water to said premises. And the said....*party*....of the second part hereby ....*covenants and agrees*...., in case of default in the payment of any water-rent levied upon said premises during said terms, to pay unto said ....*party*....of the first part, as liquidated damages for such breach of covenant, double the sum of such rent so assessed upon said premises as aforesaid.

AND the said....*party*....of the second part further....*covenants*.... with the said....*party*....of the first part, to cultivate said farm in the best manner possible and not to remove any hay or straw therefrom, and to keep same well improved and to deliver up in as good condition as when taken.

IT IS FURTHER AGREED by the said....*party*....of the second part, that neither....*he*....nor....*his*....legal representatives will underlet said premises or any part thereof, or assign this lease, without the written assent of the said....*party*....of the first part first had and obtained thereto.

THIS INDENTURE FURTHER WITNESSETH, That the said ....*party*....of the second part, for and in consideration of the sum of ....*Two*....Dollars, in hand paid, the receipt whereof is hereby acknowledged, ...*does*....hereby grant, sell, convey, and confirm unto the said ....*party*....of the first part, ...*his*....heirs and assigns, all and singular the following described goods and chattels, to-wit: ....*Six Horses, Ten Head of Cattle, One Threshing Machine, Two Harrows, Three Cultivators, and Two Wagons*....

TOGETHER with all and singular the appurtenances thereunto belonging or in any wise appertaining: TO HAVE AND TO HOLD the same unto the said....*party*....of the first part, ...*his*....heirs, executors, administrators, and assigns, to....*his*....and their sole use forever. And the said ....*party*....of the second part, for....*himself*....and for....*his*.... heirs, executors, and administrators, ...*does*....covenant and agree with the said....*party*....of the first part and....*his*....heirs, executors, administrators, and assigns, that.....*he is*.....lawfully possessed of the said goods and chattels as of.....*his*.....own property; that the same are free from all incumbrances, and that....*he*....will, and....*his*.... heirs, executors, and administrators shall, warrant and defend the same unto the said....*party*....of the first part, and....*his*....heirs, executors, administrators, and assigns, against the lawful claims and demands of all persons.

PROVIDED, NEVERTHELESS, That if the said....*party*....of the second part or....*his*....heirs, executors, administrators, or assigns, shall well and truly pay, or cause to be delivered, unto the said....*party*....of

the first part or....*his*....heirs, executors, administrators, or assigns, the said....*share of crops*....as rent, above reserved, punctually, and in the manner and at the times and place above mentioned, then and from thenceforth these presents, and everything herein contained, shall cease, and be null and void.

AND PROVIDED ALSO, That it shall be lawful for the said....*party*.... of the second part, ...*his*....heirs, executors, and administrators, to retain possession of the said granted goods and chattels, and at....*his*.... own expense to keep and to use and enjoy the same, until the said ....*party*....of the second part, or....*his*....heirs, executors, administrators, or assigns, shall make default in the payment of said rent above specified, at the time or times, and in the manner hereinbefore contained, or unless the said....*party*....of the first part shall fear diminution, removal, or waste for want of proper care, or if the said....*party*....of the second part shall sell or assign, or attempt to sell or assign said goods and chattels, or any part thereof, or if any writ issued from any court shall be levied on any part of the above-described goods and chattels—that then, and in any of the aforesaid cases, all of said....*share of crops*....above reserved as rent for said demised premises, shall become due and payable, and the said....*party*....of the first part, ...*his*....heirs, executors, administrators, and assigns, agents or attorneys, or any of them, may elect to take possession of the said property, and for that purpose may pursue the same or any part thereof, wherever it may be found, and also may enter any of the premises of the said....*party*....of the second part, with or without force or process of law, wherever the said goods and chattels may be or be supposed to be, and search for the same, and, if found, to take possession of and remove, and sell and dispose of said property, or so much thereof as may be necessary to pay the rent due, and the balance of rent for the whole unexpired term, whether due or not due, at public auction, to the highest bidder, after giving ten days' notice of the time, place, and terms of sale, together with a description of the property to be sold, either by publication in some newspaper in the....*City*....of....*Freeport*....or by similar notices posted up in three public places in the vicinity of such sale, or at private sale, with or without notice for cash or on credit, as the said ....*party*....of the first part, or....*his*....heirs, executors, administrators, or assigns, agents or attorneys, or any of them, may elect, and out of the money arising from such sale, to retain, first, all costs and charges for pursuing, searching, taking, removing, keeping, storing, advertising, and selling of such property, goods, chattels, and effects, and all prior liens, together with the rent due, and the balance of rent for the whole unexpired term, whether due or not due, rendering the overplus of the money arising from such sale, and the remainder of said goods and chattels, if any there shall be, unto the said.....*party*.....of the second part, or ....*his*....legal representatives.

IT IS EXPRESSLY UNDERSTOOD AND AGREED, by and between the parties aforesaid, that if the rent above covenanted to be paid, or any part thereof, shall be behind or unpaid on the day of payment whereon the same ought to be paid, as aforesaid, or if default shall be made in any of the cove-

nants herein contained, to be kept by the said....*party*....of the second part, ...*his*....executors, administrators, and assigns, it shall and may be lawful for the said....*party*....of the first part....*his*....heirs, executors, administrators, agents, attorneys, or assigns at....*his*....or their election, to declare said term ended, and into the said demised premises, or any part thereof, either with or without process of law, to re-enter, and said....*party*.... of the second part, or any other person or persons occupying, in or upon the same, to expel, remove, and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy, as in ....*his*....or their first and former estate, and to distrain for any rent that may be due thereon, upon any property belonging to the said....*party*.... of the second part, whether the same be exempt from execution or distress by law or not, and the said....*party*....of the second part, in that case, hereby....*agrees*....to waive all legal right which....*he*....may have to hold or retain any such property, under any exemption-law now in force in this State, or in any other way. And if at any time said term shall be ended at such election of said....*party*....of the first part, or....*his*....heirs, executors, administrators, or assigns, as aforesaid, or in any other way, the said....*party*....of the second part, or....*his*....executors, administrators, or assigns, ...*does*....hereby covenant and agree to surrender and deliver up said above described premises and property, peaceably, to said....*party*.... of the first part, or....*his*....heirs, executors, administrators, and assigns, immediately upon the determination of said term as aforesaid, and if ....*he*....shall remain in possession of the same after such default, or after the termination of this lease in any of the ways above named, ...*he*....shall be deemed guilty of a forcible detainer of said demised premises, and shall be subject to all the conditions and provisions above named, and to eviction and removal, forcibly or otherwise, with or without process of law, as above stated.

IN TESTIMONY WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

FRANK JONES....[SEAL]
ROY GRAY.....[SEAL]

In Presence of
....*JAMES HART*....

85. Mining Lease.

THIS INDENTURE, Made this....*fourth*....day of....*June*....A. D. ....*1914*....between....*Albert Johnson*....of the first part, and....*Frank Smoot*....of the second part:

WITNESSETH, That the said....*party*....of the first part, for and in consideration of the covenants and agreements hereinafter contained on the part of the said....*party*....of the second part, and of....*One Hundred* (*$100.00*)....Dollars, in hand paid to the said....*party*....of the first part, the receipt whereof is hereby acknowledged, ...*has*....granted and conveyed, and by these presents....*does*....grant and convey to the said....*party*....of the second part, ...*his*....heirs, executors, adminis-

trators, and assigns, the right of entering in and upon the lands hereinafter described, for the purpose of searching for mineral and fossil substances, and of conducting mining and quarrying operations, to any extent....*he*.... or they may deem advisable (but not to hold possession of any part of said lands for any other purpose whatsoever), paying for the site of buildings of any kind, necessary thereto, a reasonable rent.

The said lands are situated in Section....*Five* (*5*) Township ....*Two* (*2*)....Range....*Six* (*6*) *East*....of the....*Third*....Principal Meridian.

AND the said....*party*....of the second part hereby....*agrees*....that ....*he*....or....*his*....heirs, executors, administrators, or assigns, will pay or cause to be paid to the said....*party*....of the first part, ...*his*.... heirs or assigns, an annual rent of the amount of....*One Thousand* (*$1,000.00*)....Dollars, in four equal quarterly payments, payable severally on the following days: ....*January second, April second, August second, November second*....; and also....*covenants*....that no damage shall be done to or upon said lands and premises, other than may be necessary in conducting said operations.

AND IT IS AGREED AND COVENANTED by and between the parties hereunto, that this lease shall be and remain in full force and effect (subject to the proviso hereinafter stated)....*Two*....years from the date hereof, and no longer. But the said parties of the first and the second part, each for themselves, their heirs, executors, administrators, and assigns, covenant and agree, and this indenture is made with this express proviso, that if no mineral or fossil substance be mined or quarried, as now contemplated by said parties within the period of....*Two*....years from the present time, then these presents, and everything contained herein, shall cease and be forever null and void.

IN TESTIMONY WHEREOF, the parties to these presents have hereunto set their hands and seals the day and year first above written.

ALBERT JOHNSON....[SEAL]
FRANK SMOOT.....[SEAL]

Signed, Sealed, and Delivered in the Presence of
....*JOHN EBY*....

86. Lease of Personal Property.

Town, ...*Alberta*...., County, ...*Sandwich*...., State, ...*Iowa*...., Postoffice, ...*Alberta*...., Date....*July third*....A. D....*1914*....

THIS IS TO CERTIFY, That....*I*....have received and rented from ....*James Hardy one threshing machine of Case manufacture, style No. Four B*....with the usual accessories, ...*stacker, feeder and weigher*...., the value of which is....*One Thousand* (*$1,000.00*)....Dollars, for the use of which....*I*....agree to pay the sum of....*Seventy-five* (*$75.00*).... Dollars, in advance, and....*Fifty* (*$50.00*)....Dollars per month for ....*six*....months, payable on the....*first*....day of each month, following....*August, 1914*.... Payments to be made at the office of....*Case Manufacturing Company, Racine, Wisconsin*....

....*I*....ALSO AGREE, that said....*machine*....or any part thereof, shall not be removed for a greater period than....*one week*....from my ....*farm residence near Alberta, Iowa*....without the written consent of the said.....*Case Manufacturing Company*....., and to give the said ....*Case Manufacturing Company*....immediate notice in case the property is LEVIED UPON or becomes liable to be disturbed from any cause whatever.

AND....*I*....FURTHER AGREE, that if any DEFAULT be made in the payment of rent as above specified, or in the performance of any other of the above agreements, that this LEASE, at the option of said....*Case Manufacturing Company*...., shall wholly cease and terminate, and....*I*....will relinquish....*my*....possession of, and all claims in and to said property, and deliver the same to the said....*Case Manufacturing Company*....or ....*its*....agent, in as good order as when received, the reasonable wear and tear excepted, and the said....*Case Manufacturing Company*....or ....*its*....agent, may, without notice, enter....*my*....premises, and take possession of and remove the same, with or without process of law, no title being acquired by....*me*....to said property or any part thereof.

IN WITNESS WHEREOF, ...*I*....have hereunto set....*my hand and seal*....this....*third*....day of....*July*....A. D....*1914*....

DANIEL CUNNINGHAM....[SEAL]

In Presence of

....*FRANK HART*....

E. (b) Landlord and Tenant—Notices.

87. Landlord's Notice to Quit for Non-Payment of Rent.

STATE OF....*ILLINOIS*....}
County of ..... *Cook* .....} ss.

....*Chicago, May fourth*....A. D....*1914*....

To....*John Schmidt*....

You being in possession of the following described premises, which you occupy as....*my*....tenant, ...*125 No. Sangamon Street*....in the ....*City*....of....*Chicago*....and County of....*Cook*....aforesaid, are hereby notified to quit and deliver up to....*me*....the premises aforesaid, in....*fourteen*....days from this date, according to law, your rent being due and unpaid. Hereof fail not, or....*I*....shall take a due course of law to eject you from the same.

FRANK JONES....

88. Landlord's Notice of Termination of Tenancy.

To....*JOHN JAMES*....

....*1252 W. Leavitt Street, Chicago, Ill*....

YOU ARE HEREBY NOTIFIED, That your tenancy of the following premises, to-wit: ....*Apartment No. 1 at 1252 W. Leavitt Street*....situate in the....*City*....of....*Chicago*...., in the County of....*Cook*...., and

State of....*Illinois*...., will terminate on the....*thirty-first*....day of ....*August*....A. D....*1914*...., and you are now hereby required to surrender possession of said premises to....*me*....on that day.

DATED at....*Chicago, Illinois*...., this....*twenty-fourth*....day of ....*June*....A. D....*1914*....

PETER SCHMIDT....

89. Tenant's Notice of Termination of Tenancy.

....*I*....hereby give you notice that it is....*my*....desire to deliver up possession of the certain premises, with the appurtenances, situated at....*315 North Clark Street, Chicago, Illinois*...., which....*I*....now hold as tenant under you, at the expiration of....*my*....current term, to wit: on the ....*thirtieth*....day of....*September*....A. D....*1914*....

JOHN JONES....

90. Landlord's Notice to Terminate Tenancy at Will.

....*I*....hereby give you notice to quit, and deliver up to....*me*....on the....*first*....day of....*October*....A. D....*1914*...., the premises now held by you as....*my*....tenant, at....*No. 516 West 25th Street*...., in the....*City*....of....*Chicago*....

WILLIAM HART....

DATED this....*ninth*....day of....*August*....A. D....*1914*....

91. Tenant's Notice Terminating Tenancy at Will.

....*I*....hereby give you notice that on the....*first*....day of....*October next, I*....shall quit and deliver up the premises situated at....*722 East 30th Street*...., which....*I*....now hold of you as your tenant.

LUTHER JONES....

F. Mortgages.

92. Chattel Mortgage.

KNOW ALL MEN BY THESE PRESENTS, That....*Henry Jones and John Jones*....of the....*City*....of....*Chicago*....in the County of ....*Cook*....and State of....*Illinois*...., in consideration of the sum of.....*Two Thousand* (*$2,000.00*).....Dollars to.....*them*.....paid by .....*Frank Ward*.....of the.....*Town*.....of.....*Brookfield*.....of the County of....*Cook*....and State of....*Illinois*...., the receipt whereof is hereby acknowledged, ...*do*....hereby GRANT, SELL, CONVEY and CONFIRM, unto the said....*Frank Ward*....and to....*his*....heirs and assigns, the following GOODS AND CHATTELS, to-wit: ....*All the fixtures now in use by Henry Jones and John Jones in their offices at 75 West Monroe Street in Chicago*....;

TO HAVE AND TO HOLD all and singular the said Goods and Chattels, unto the said....*Mortgagee*....herein, and....*his*....heirs, executors, administrators and assigns, to....*his*....and their sole use, FOREVER. And the....*Mortgagors*....herein, for....*themselves*....and for....*their*.... heirs, executors, and administrators, ...*do*....hereby covenant to and with the said....*Mortgagee, his*....heirs, executors, administrators, and assigns, that said....*Mortgagors are*....lawfully possessed of the said Goods and Chattels, as of....*their*....own property; that the same are free from all encumbrances, and that....*they*....will, and....*their*....executors and administrators shall, warrant and defend the same to....*him*....the said ....*Mortgagee, his*....heirs, executors, administrators, and assigns, against the lawful claims and demands of all persons.

PROVIDED, NEVERTHELESS, That if the said...*Mortgagors, their*... executors or administrators, shall well and truly pay unto said...*Mortgagee, his*....executors, administrators or assigns, said sum of....*Two Thousand* (*$2,000.00*)....Dollars on or before....*August first*....A. D....*1914*...., with interest at the rate of....*six*....per cent per annum, then this Mortgage is to be void, otherwise to remain in full force and effect.

AND, PROVIDED, ALSO, That it shall be lawful for the said....*Mortgagors, their*....executors, administrators and assigns, to retain possession of the said Goods and Chattels, and at....*their*....own expense, to keep and use the same, until....*they*....or....*their*....executors, administrators or assigns, shall make default in the payment of the said sum of money above specified, either in principal or interest, at the time or times, and in the manner hereinbefore stated. AND the said....*Mortgagors*....hereby....*covenant and agree*....that in case default shall be made in the payment of the....*Note*....aforesaid, or any part thereof, or the interest thereon, on the day or days respectively on which the same shall become due and payable; or if the....*Mortgagee, his*....executors, administrators or assigns, shall feel for any good reason insecure or unsafe, or shall fear diminution, removal or waste of said property; or if the....*Mortgagors*....shall sell or assign, or attempt to sell or assign, the said Goods and Chattels, or any interest therein; or if any Writ, or any Distress Warrant, shall be levied on said Goods and Chattels, or any part thereof; then, and in any or either of the aforesaid cases, all of said....*Note*....and sum of money, both principal and interest, shall, at the option of the said....*Mortgagee, his*....executors, administrators or assigns, without notice of said option to anyone, become at once due and payable, and the said....*Mortgagee, his*....executors, administrators or assigns, or any of them, shall thereupon have the right to take immediate possession of said property, and for that purpose may pursue the same wherever it may be found, and may enter any of the premises of the ....*Mortgagors*...., with or without force or process of law, wherever the said Goods and Chattels may be, or be supposed to be, and search for the same, and if found, to take possession of, and remove, and sell, and dispose of the said property, or any part thereof, at public auction, to the highest bidder, after giving....*thirty*....days' notice of the time, place and terms of sale, together with a description of the property to be sold,

by notices posted up in three public places in the vicinity of such sale, or at private sale, with or without notice, for cash or on credit, as the said ....*Mortgagee, his*....heirs, executors, administrators or assigns, agents or attorneys, or any of them, may elect; and, out of the money arising from such sale, to retain all costs and charges for pursuing, searching for, taking, removing, keeping, storing, advertising, and selling such Goods and Chattels, and all prior liens thereon, together with the amount due and unpaid upon said....*Note*...., rendering the surplus, if any remain, unto said....*Mortgagors*...., or....*their*....legal representatives.

WITNESS the....*hands and seals*....of the said....*Mortgagors*...., this....*first*....day of....*August*....A. D....*1914*....

HENRY JONES....[SEAL]
JOHN JONES.....[SEAL]

Sealed and Delivered in the Presence of
....*WILLIAM JAMES*....
....*HENRY SMITH*.....

STATE OF....*ILLINOIS*....
County of ..... *Cook* ..... } ss.

I, ...*Frank P. Danisch*....., Clerk of the.....*Municipal Court of Chicago*...., in the....*First*....District, DO HEREBY CERTIFY, that this Mortgage was duly acknowledged before me by....*Henry Jones and John Jones*...., the....*Mortgagors*....therein named, and entered by me this....*first*....day of....*August*....A. D....*1914*....

WITNESS my hand and seal.

FRANK P. DANISCH.....[SEAL]
Clerk of the....*Municipal Court of Chicago*....,
in the....*First*....District.

STATE OF....*ILLINOIS*....
County of ..... *Cook* ..... } ss.

....*Henry Jones and John Jones*...., of said County, being duly sworn, ...*depose and say*....: That....*they are*....the lawful....*owners*....of the goods and chattels described in the within Chattel Mortgage to which this is attached, and made a part thereof; and that said goods and chattels are free and clear of all liens or incumbrances, except the said Mortgage to which this paper is attached. And that there are no judgments or executions against ....*either of*....the said....*Henry Jones and John Jones*....that affect the title of said goods and chattels named in said Mortgage and that ....*they*....by and under the foregoing representations have obtained a loan of....*Two Thousand* (*$2,000.00*)....Dollars, of which said Chattel Mortgage is given to secure the payment and interest.

HENRY JONES....[SEAL]
JOHN JONES.....[SEAL]

Subscribed and sworn to before me, this....*first*....day of....*August*....
A. D....*1914*....
[OFFICIAL SEAL]

FRANK P. DANISCH.....
Clerk....*Municipal Court*....

NOTE. Acknowledgment may be taken by any authorized official.

93. Chattel Mortgage, Affidavit to Extend.

STATE OF....*ILLINOIS*....}
County of .....*Cook*.....} ss.

....*Frank Jones*...., of said County, being duly sworn, ...*says*.... that....*he is*....the....*mortgagee*....named in a certain Chattel Mortgage, dated the....*first*....day of....*August*....A. D....*1913*....and duly acknowledged before....*Frank Ward, a Notary Public*....in and for said County, and recorded in the Recorder's Office of said County on the ....*third*....day of....*August*....A. D....*1913*...., in Book....*22*...., on page....*253*....of Records of said County; and that....*Henry Smith and Mary Smith are*....the....*mortgagors*....named in the said Chattel Mortgage. ....*Affiant*....further....*says*....that the debt mentioned in said Chattel Mortgage will, by the terms thereof, mature and become due on the....*first*....day of....*August*....A. D....*1914*...., and that....*he*.... the said....*Frank Jones, mortgagee*...., by virtue of the said Chattel Mortgage, ...*has*....an interest in the same and in the property mentioned in said Chattel Mortgage; that the said Chattel Mortgage is given as security for the loan of money, and that there is now due and unpaid on account of said Chattel Mortgage, the sum of....*Fifteen Hundred* (*$1500.00*)....Dollars, and the same will become due by extension thereof, on the....*first*....day of....*August*....A. D....*1915*.... And....*affiant shows*....the items and the times and amounts, when the said sum will become due, and the interest of the said....*Frank Jones, mortgagee*.... therein, as follows: ....*One note*....dated....*August first*....A. D. ....*1914*.... Due....*August first*....A. D.....*1915*.... Amount....*Fifteen Hundred* (*$1500.00*)....Dollars, with interest at....*six*....per cent. And....*affiant*....further....*says*....that....*he, Frank Jones, mortgagee*...., is interested in the said Chattel Mortgage and the property therein mentioned, to the extent of the due payment of the said sum of money so due and unpaid.

AND....*affiant makes*....this affidavit for the purpose of extending the time of payment of said debt and the lien of said Chattel Mortgage on the property therein mentioned, according to the statute in such case made and provided. Such Chattel Mortgage is hereby extended by agreement of....*Henry Smith and Mary Smith, mortgagors*...., and....*Frank Jones, mortgagee*..., to the...*first*...day of.....*August*...A. D...*1915*...

HENRY SMITH....
MARY SMITH.....
FRANK JONES....

NOTE. Should be acknowledged before authorized official. See No. 17.

94. Chattel Mortgage, Statutory Form.

....*I, Henry Smith*...., of....*Williams*....County....*Maryland*...., being now indebted to....*Frank Jones*...., of....*Williams*....County, in the sum of....*Three Hundred* (*$300.00*)....Dollars, with interest from ....*January first*....A. D....*1913*...., in consideration therefor do hereby

bargain and sell to the said....*Frank Jones*....the following property: ....*One Case Threshing Machine*...., owned by....*me*....and kept by ....*me*....on....*my farm near Connellsville*...., provided that if....*I*...., the said....*Henry Smith*...., shall pay to the said....*Frank Jones*....the sum of....*Three Hundred* (*$300.00*)....Dollars, with the interest thereon on or before the....*second*....day of....*January*....A. D....*1915*...., then these presents shall be void.

WITNESS....*my hand and seal*....this....*second*....day of....*January*....A. D....*1914*....

HENRY SMITH....[SEAL]

NOTE. The remarks in first paragraph of note accompanying No. 69 are applicable here.

95. Realty Mortgage.

THIS INDENTURE, Made this....*third*....day of....*June*....A. D. ....*1914*....between....*Frank Warren*....of the....*City*....of....*Chicago*....in the County of....*Cook*....and State of....*Illinois, party*....of the first part, and....*Henry Williams*....of the....*Village*....of....*Wilmette*....in the County of....*Cook*....and State of....*Illinois, party*.... of the second part:

WHEREAS, The said....*party*....of the first part....*is*....justly indebted to the said....*party*....of the second part in the sum of....*Two Thousand* (*$2,000.00*)....Dollars, secured to be paid by....*five* (*5*).... certain promissory....*notes*....falling due....*one* (*1*), *two* (*2*), *three* (*3*), *four* (*4*), *five* (*5*) *years*....from date, with interest at the rate of....*five*.... per cent per annum until maturity, which interest payments are likewise evidenced by....*thirty* (*30*) *coupon interest notes*....;

NOW, THEREFORE, THIS INDENTURE WITNESSETH, That the said....*party*....of the first part, for the better securing the payment of the money aforesaid, with interest thereon according to the tenor and effect of said....*notes*....above mentioned, and also in consideration of the further sum of One Dollar to....*him*....in hand paid by the said ....*party*....of the second part, at the delivery of these Presents, the receipt whereof is hereby acknowledged, ...*has*....granted, bargained, sold, remised, released, conveyed, aliened and confirmed, and by these Presents....*does*....grant, bargain, sell, remise, release, convey, alien and confirm, unto the said....*party*....of the second part, and to....*his*.... heirs and assigns FOREVER, all the following described lot, piece, or parcel of land situate in the County of....*Cook*....and State of....*Illinois*.... and known and described as follows, TO WIT: Lots....*Two and Three* (*2 and 3*)...., Block....*Four* (*4*)....of....*James' Subdivision*....to the ....*City*....of....*Evanston*....

TO HAVE AND TO HOLD THE SAME, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging, or in any wise appertaining; and also, all the estate, interest, and claim whatsoever, in law as well as in equity, which the said...*party*... of the first part....*has*....in and to the premises hereby conveyed, unto

the said....*party*....of the second part, ...*his*....heirs and assigns, and to their only proper use, benefit, and behoof, forever;

PROVIDED ALWAYS, And these Presents are upon this EXPRESS CONDITION, that if the said....*party*....of the first part, ...*his*....heirs, executors, or administrators, shall well and truly pay, or cause to be paid, to the said....*party*....of the second part, ...*his*....heirs, executors, administrators, or assigns, the aforesaid sum of money, with interest thereon, at the time and in the manner specified in the above mentioned....*notes*.... according to the true intent and meaning thereof, then and in that case these Presents, and everything herein expressed, shall be absolutely null and void.

AND the said....*party*....of the first part, for....*himself*....and ....*his*....heirs, executors, and administrators, ...*does*....hereby covenant and agree with the said....*party*....of the second part, that at the time of the delivery hereof, the said....*party*....of the first part....*is*.... the lawful....*owner*....of the premises above granted, and seized thereof in fee simple absolute; that....*he*....will WARRANT AND DEFEND the above granted premises in the quiet and peaceable possession of the said....*party*....of the second part, ...*his*....heirs and assigns FOREVER, that they are free from all incumbrances whatsoever, and that the said....*party*....of the first part will, in due season, pay all taxes and assessments on said premises, until said indebtedness aforesaid shall be fully paid.

AND the said....*party*....of the first part....*does*....hereby expressly release and waive all rights, under and by virtue of the Homestead Exemption Laws of the State of....*Illinois*....in and to said premises.

IN WITNESS WHEREOF, the said....*party*....of the first part ....*has*....hereunto set....*his hand and seal*....the day and year first above written.

FRANK WARREN....[SEAL]
.....[SEAL]
.....[SEAL]

Signed, Sealed and Delivered in the Presence of
....*JAMES THORPE*....
....*SIMON RUBENS*....

NOTE. Should be acknowledged before authorized official. See No. 69.

96. Release of Mortgage.

KNOW ALL MEN BY THESE PRESENTS, That...*I, Frank Ward*..., of the County of....*Cook*....and State of....*Illinois*...., DO HEREBY CERTIFY, That a certain Indenture of Mortgage, bearing date the ....*first*....day of....*August*....A. D....*1912*...., made and executed by....*Henry Jones and Mary Jones*....of the first part, to....*Frank Ward*....of the second part, and recorded in the Recorder's Office of ....*Cook*....County, in the State of....*Illinois*....in Book....*22*....of Mortgages, on page....*253*...., on the....*third*....day of....*August*....

A. D....*1914*...., is, with the notes accompanying it, fully paid, satisfied, released and discharged.

*WITNESS....my hand and seal....*this....*fifth*....day of....*August....A. D....1914....*

FRANK WARD....[SEAL]

.....[SEAL]

NOTE. Acknowledgment before authorized official should be added. See No. 69.

G. Power of Attorney.

97. Power of Attorney to Sell Lands.

KNOW ALL MEN BY THESE PRESENTS, That....*I*...., the undersigned....*Frank Ward*...., of the....*Town*....of....*Chadwick*....of the County of....*Carroll*....and State of....*Illinois*...., have this day made, constituted, and appointed, and do by these presents make, constitute, and appoint....*John Shaw*...., of the....*Town*....of....*Chadwick*....in the County of....*Carroll*....and State of....*Illinois, my*....true and lawful attorney, for....*me*....and in....*my name*....to sell and dispose of, absolutely in fee-simple, the following described lot, tract, or parcel of land, or any part thereof, situate, lying, and being in the County and State aforesaid, to wit: the....*Southeast* (*S. E.*) *One-quarter* (¼)...., Section...*Five* (*5*)...., Township....*Two* (*2*)...., Range....*One* (*1*), *East*....of the ....*Third*....Principal Meridian, for such price or sum of money, or to such person or persons as he shall think fit and convenient; and also for ....*me*....and in....*my name*...., and as....*my*....act and deed, to sign, execute, acknowledge, and deliver such deed or deeds, and conveyance or conveyances, for the absolute sale and disposal thereof, or of any part thereof, with such clause or clauses, covenant or covenants, and agreement or agreements, to be therein contained, as....*my*....said attorney shall think fit and expedient; hereby ratifying and confirming all such deeds, conveyances, bargains, and sales which shall at any time hereafter be made by said attorney touching or concerning the premises.

IN TESTIMONY WHEREOF, ...I....have hereunto set....*my hand and seal*...., on this....*fourth*....day of....*March*....A. D....*1914*....

FRANK WARD....[SEAL]

NOTE. Acknowledgment before authorized official should accompany. See No. 69.

H. Trust Declarations.

98. Declaration of Trust in Personalty.

KNOW ALL MEN BY THESE PRESENTS, that...*I, William Ward*..., of...*Brenner, Illinois*..., in consideration of...*One Hundred* (*$100.00*)... Dollars, to....*me*....in hand paid, hereby acknowledge and declare that ....*I am*....possessed of the following personal property and trust, namely: ....*ten shares of the stock of the Missouri River Transportation Company*....for the annual benefit and advantage of....*Albert Smith*...., of

....*Brenner, Illinois*...., the same having been purchased with moneys of the said....*Albert Smith*...., and all the income therefrom from henceforth accruing to become due, is held only in trust for the said....*Albert Smith*...., and....*I*...., for....*myself, my*....executors, administrators, and assigns, hereby covenant with the said....*Albert Smith, his*....executors, administrators, and assigns, that....*I*....will, at any time hereafter, at the request and expense of said....*Albert Smith*...., assign and transfer the said property to....*him*....or....*his*....order.

IN WITNESS WHEREUNTO, the parties have hereunto set their hands and seals this....*first*....day of....*August*....A. D....*1914*....

WILLIAM WARD.....[SEAL]
ALBERT SMITH.....[SEAL]

99. Declaration of Trust in Realty.

INDENTURE, Made the.....*ninth*.....day of.....*August*.....A. D. ....*1914*...., between....*Oscar Jones*..., of...*Brenner, Illinois, party*... of the first part, and.....*Henry Smith*....., of.....*La Grange, Illinois, party*....of the second part:

WHEREAS, by deed dated the....*first*....day of....*August*....A. D. ....*1914*...., and recorded with....*Abel Davis*...., Recorder of County Deeds, Book....*7*...., Page....*356, William Ward*....., of.....*Brenner, Illinois*...., conveyed to the said....*party*....of the first part a certain parcel of land, with the buildings thereon, situated....*on the north side of Home Ave*....in said....*Town*....of....*Brenner*...., and the said buildings being numbered....*522 and 526*....on said street; and whereas, the whole consideration or sum paid by the said....*party*....of the first part for the purchase of the said land and premises was...*Ten Thousand* (*$10,000.00*)... Dollars, of which sum.....*one-half part*.....was the money of the said ....*party*....of the first part and....*one-half part*....was money belonging to the said....*party*....of the second part. The said purchase was made by said....*party*....of the first part as to one equal undivided half part of said premises as a trustee for and on behalf of the said....*party*.... of the second part, as the said....*party*....of the first part doth admit and declare:

NOW, THIS INDENTURE WITNESSETH, That in consideration of the premises, it is hereby agreed and declared by and between the said parties hereto, that the said....*party*....of the first part, ...*his*....heirs and assigns, doth and shall stand seized of one undivided half part of the land and premises, with the appurtenances thereof, conveyed by the deed hereunto recited, in trust for the said....*party*....of the second part, ...*his*.... heirs and assigns forever, and will convey, lease or dispose of the same in such manner as....*he*....or they shall direct.

IN WITNESS WHEREUNTO, the parties have hereunto set their hands and seals the day and date first above written.

Witnesses:
....*JAMES WARD*.....
....*HARRY BAXTER*....

OSCAR JONES.....[SEAL]
HENRY SMITH....[SEAL]

CHAPTER III.

[1] COURT PRACTICE FORMS.

A. Bankruptcy Forms.

100. Notice to Creditors.

IN THE DISTRICT COURT OF THE UNITED STATES, for the ....*Northern*....District of....*Illinois*.... In the matter of....*Henry Krug*...., Bankrupt. In Bankruptcy. No....*20849*....

To the Creditors of....*Henry Krug*...., of....*Chicago*....in the County of....*Cook*....and district aforesaid, a Bankrupt:

Notice is hereby given, that on the....*fifteenth*....day of....*April*.... A. D....*1914*...., the said....*Henry Krug*....was duly adjudicated bankrupt and that the first meeting of....*his*....creditors will be held at my office, Room....*907 Monadnock Block, No. 53 West Jackson Boulevard*...., in....*Chicago, Illinois*...., on the....*twenty-ninth*....day of....*April*.... A. D....*1914*...., at....*10:30*....o'clock in the....*forenoon*...., at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt and transact such other business as may properly come before said meeting.

SIDNEY C. EASTMAN....,
REFEREE IN BANKRUPTCY.

Chicago, April 15....A. D....*1914*....

101. Order for Discharge of Bankrupt.

IN THE DISTRICT COURT OF THE UNITED STATES, for the ....*Northern*....District of....*Illinois, Eastern Division.*

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[1] To save trouble for court attachés, all documents to be filed in court should be folded in convenient form, and the name of the court, county and state where situated, title of the case, its court number where known, or blank to be filled in when learned, and the nature of the pleading, with the names of the attorneys filing same, should appear on that portion of the paper which is first seen when folded. This is called the backing, and corresponds to the heading which appears on the inside at the beginning of any form. See Nos. 126 and 127. Acceptance of documents not complying with these requirements may be refused, and in any event, great risk is run of their not reaching the proper file.

WHEREAS, ...*Henry Krug*...., of....*Chicago*...., in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said....*Henry Krug*....be discharged from all debts and claims which are made provable by said acts against....*his*....estate, and which existed on the....*third*.... day of....*May*....A. D....*1914*...., on which day the petition for adjudication was filed by....*his attorney for him*....; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

WITNESS THE HONORABLE....*CHARLES A. CARPENTER*...., Judge of said District Court, and the seal thereof, this....*thirtieth*....day of ....*August*....A. D....*1914*....

PERRY C. ANDRE....,
CLERK.

[SEAL OF THE COURT]

102. Petition for Discharge of Bankrupt.

IN THE MATTER OF
....*HERMAN KRUG*....,
BANKRUPT.
} In Bankruptcy. No....*51721*....

TO THE HONORABLE....*GEORGE A. CARPENTER*...., Judge of the District Court of the United States for the....*Northern*....District of ..:.*Illinois, Eastern Division Thereof:*

....*Herman Krug*...., of....*1221 W. Division Street, Chicago*...., in the County of....*Cook*....and State of....*Illinois*...., in said district, respectfully represents that on the....*tenth*....day of....*May*....last past, ...*he*....was duly adjudicated a bankrupt under the acts of Congress relating to bankruptcy; that....*he*....has duly surrendered all....*his*.... property and rights of property and has now fully complied with all the requirements of said acts and of the orders of the court touching....*his*.... bankruptcy.

WHEREFORE....*he*....prays that....*he*....may be decreed by the court to have a full discharge from all debts provable against....*his*.... estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this....*twentieth*....day of....*July*....A. D....*1914*....

HERMAN KRUG....,
BANKRUPT.

ORDER OF NOTICE THEREON.

NORTHERN DISTRICT OF....*ILLINOIS*....,
....*Eastern Division*....
} ss.

On this....*twentieth*....day of....*July*....A. D....*1914*...., on reading the foregoing petition, it is

ORDERED BY THE COURT, that a hearing be had on the same on the ....*thirtieth*....day of....*September*....A. D....*1914*...., before said

court, at....*Federal Building, Chicago*...., said district, at....*two*.... o'clock in the....*afternoon*....; and that notice thereof be published in the....*Chicago Law Bulletin*...., a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

AND IT IS FURTHER ORDERED BY THE COURT, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

WITNESS THE HONORABLE....*GEORGE A. CARPENTER*...., Judge of the said court, and the seal thereof, at....*Chicago*...., in said district, on the....*twentieth*....day of....*July*....A. D....*1914*....

PERRY C. ANDRE....,
CLERK.

[SEAL OF THE COURT]

103. Petition by Creditors.

TO THE HONORABLE....*GEORGE A. CARPENTER*...., Judge of the District Court of the United States for the....*Northern*....District of ....*Illinois, Eastern Division Thereof*....:

THE PETITION OF....*Central Rubber Company, William Jones and John Hardy*....respectfully shows:

THAT....*Henry Warner*...., of....*Chicago, Illinois*...., has for the greater portion of six months next preceding the date of filing this petition, ...*had his principal place of business*....at....*211 W. Erie Street, Chicago, Illinois*...., in the County of....*Cook*...., and State and District aforesaid, and owes debts to the amount of....*$1,000.00*....

THAT YOUR.....*petitioners are creditors*.....of said.....*Henry Warner*...., having provable claims amounting in the aggregate, in excess of securities held by....*them*...., to the sum of....*$500.00*.... That the nature and amount of your....*petitioners'*....claims are as follows:

....*Central Rubber Company—Automobile tires furnished—Balance due, $300.00*....

....*William Jones—Plate glass furnished—Balance due, $150.00*....

....*John Hardy—Premium on policy of liability insurance—Balance due, $210.00*....

AND YOUR....*petitioners*....further....*represent*....that said....*Henry Warner*....is insolvent, and that within four months next preceding the date of this petition the said....*Henry Warner*....committed an act of bankruptcy, in that....*he*....did heretofore, to wit, on the....*fifth*....day of....*July*....A. D....*1913*...., pay to....*one Earnest Harman*...., the sum of....*Two Hundred* (*$200.00*)....Dollars, with intent while insolvent to prefer said creditor over others.

WHEREFORE, YOUR....*petitioners pray*....that service of this petition, with a subpœna, may be made upon....*Henry Warner*...., as provided

in the acts of Congress relating to bankruptcy, and that....*he*....may be adjudged by the Court to be a bankrupt within the purview of said acts.

CENTRAL RUBBER COMPANY.....,
By....*James Tallmann, President*....
WILLIAM JONES.....
....*WARD & PEABODY*...., *JOHN HARDY*.....
ATTORNEYS. PETITIONERS.

UNITED STATES OF AMERICA,
....*Northern*....District of....*Illinois*.... } ss.

....*James Tallmann, President of Central Rubber Company, William Jones, and John Hardy*...., being....*three of the petitioners*....above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by....*them*....are true.

BEFORE ME, ...*John Jamar*...., this.....*ninth*.....day of.....*August*....A. D....*1914*....

[SEAL OF THE COURT] *JOHN JAMAR*....,
CLERK OF THE COURT AFORESAID.

104. Petition by Creditors for Receiver.

IN THE DISTRICT COURT OF THE UNITED STATES, ...*Northern*...
District of....*Illinois, Eastern Division*....

IN THE MATTER OF
.....*Trude Manufacturing Company*.....,
BANKRUPT. } In Bankruptcy,
No....*17754*....

....*The Pittsburgh Plate Company and the Burns Paint Company*...., the petitioning....*creditors*....in the involuntary petition in bankruptcy pending herein against....*Trude Manufacturing Company*...., the alleged bankrupt above named, ...*move*....the court for an order appointing ....*a receiver*....herein, and for a warrant to issue to such....*receiver*...., authorizing and directing....*him*....to seize the property of said alleged bankrupt and to hold the same pending the hearing upon said petition; and this....*they pray*....for upon the ground that it is absolutely necessary, for the preservation of the estate, that....*a receiver*....be appointed; that said alleged bankrupt has committed an act of bankruptcy, in that heretofore, to wit, on the....*second*....day of....*June*....A. D....*1914*, *it*....did transfer and pay to....*one Henry Williams*....the sum of ....*Two Hundred* (*$200.00*)....Dollars, with the intent, while insolvent, to prefer the said....*Williams, one of its*....creditors, over the other creditors of the said....*Trude Manufacturing Company*....; and that said alleged bankrupt has neglected and is neglecting, and is about to further so neglect....*its*....property that it has deteriorated and is hereby deteriorating, and is about to further deteriorate in value, and this is so from the following facts, to wit: That on, to wit, the....*first*....day of ....*August*....A. D....*1914*...., the said alleged bankrupt ceased operations at....*its*....factory, and the same is now shut down; that the yards of the said alleged bankrupt are not protected or sheltered, that the buildings are open, and that the machinery and stock in said yards and build-

ing are not properly guarded and protected against the weather and trespassers; and that the yards, building, and machinery are in a dilapidated condition.

PITTSBURGH PLATE COMPANY....,
BURNS PAINT COMPANY.....,
....Petitioners....
BY *WILLIAM PRATT.....,*
....Their Attorney....

UNITED STATES OF AMERICA,
....*Northern*....District of....*Illinois*....,} ss.
County of....*Cook*....

....*William Pratt*...., being duly sworn, on oath deposes and says that he is the duly authorized agent and attorney in fact for the petitioning ....*creditors*....in the above entitled proceedings, and that the facts stated in....*their*....foregoing motion for the appointment of....*a receiver*.... and for warrant of seizure are true. *WILLIAM PRATT*....

NOTE. Should be acknowledged before authorized official. See No. 17.

105. Petition by Debtor.

TO THE HONORABLE....*GEORGE A. CARPENTER*...., Judge of the District Court of the United States for the....*Northern*....District of ....*Illinois, Eastern Division Thereof*....:

THE PETITION OF....*Herman Krug*...., of....*Chicago*...., in the County of....*Cook*...., and....*Northern*....District and State of....*Illinois, a contractor*...., respectfully represents:

THAT....*he*....has had....*his*....principal place of....*residence*.... for the greater portion of six months next immediately preceding the filing of this petition at....*1221 W. Division Street*...., within said judicial district; that....*he*....owes debts which....*he*....is unable to pay in full; that....*he*....is willing to surrender all....*his*....property for the benefit of....*his*....creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

THAT THE SCHEDULE HERETO ANNEXED, marked *A*, and verified by your petitioner's oath, contains a full and true statement of all ....*his*....debts, and (so far as it is possible to ascertain) the names and places of residence of....*his*....creditors, and such further statements concerning said debts as are required by the provisions of said acts:

THAT THE SCHEDULE HERETO ANNEXED, marked *B*, and verified by your petitioner's oath, contains an accurate inventory of all....*his*.... property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

WHEREFORE YOUR PETITIONER PRAYS that....*he*....may be adjudged by the court to be bankrupt within the purview of said acts.

....*CHARLES TOWNER*...., *HERMAN KRUG*....
ATTORNEY

NOTE. Oath should be made by petitioner, as in No. 104.

106. Proof of Debt.

IN THE DISTRICT COURT OF THE UNITED STATES, for the ....*Northern*....District of....*Illinois, Eastern Division.*

IN THE MATTER OF ....*Henry Krug*...., BANKRUPT. } In Bankruptcy. No....*51721*....

UNITED STATES OF AMERICA, ...*Northern*....District of....*Illinois*...., State of....*Illinois*...., County of....*Cook*.... } ss.

AT....*Chicago*...., in said....*Northern*....District of....*Illinois*...., on the....*fifth*....day of....*July*....A. D....*1914*...., came....*Frank Ward, 323 W. Polk Street, Chicago*...., in the County of....*Cook*...., in said....*Northern*....District of....*Illinois*...and State of...*Illinois*...., and made oath and....*says*....that the said....*Henry Krug*...., the person....*by*....whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said....*deponent*....in the sum of....*Fifty ($50.00)*....Dollars and....*no*....Cents, with interest from....*July first*...., A D....*1912*...., at....*six*....per cent per annum; that the consideration of said....*debt*....is as follows: ....*For groceries bought by and delivered to*....said....*Henry Krug*....; that no part of said....*debt*.... has been paid; that there are no set-offs or counterclaims to the same; that said....*debt was*....due on the....*first*....day of....*July*....A. D. ....*1912*....;that no note has been received for such....*account*...., nor any judgment rendered thereon, and that....*deponent has*....not, nor has any person by....*his*....order, or to....*his*....knowledge or belief, for ....*his*....use, had or received any manner of security for said....*debt*.... whatever.

FRANK WARD....,
....*Creditor*....

NOTE. Acknowledgment before authorized official should accompany. See No. 17. Some of the statements in the above form other than those indicated by italics may have to be qualified according to the facts of any particular case, as, of course, is true to a certain extent of all the Forms.

B. Court Bonds.

107. Administrator's Bond with Oath.

KNOW ALL MEN BY THESE PRESENTS, That we, ...*Henry Farber, James Jordan, and Frank Smith*...., of the County of....*Cook*...., and State of....*Illinois*...., are held and firmly bound unto the People of the State of....*Illinois*....in the penal sum of....*Four Thousand ($4,000.00)*....Dollars, current money of the United States, for which payment, well and truly to be made and performed, we and each of us bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

WITNESS our hands and seals this....*fifth*....day of....*July*....A. D. ....*1914*....

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH That if the said....*Henry Farber, administrator*...., of all and singular the goods and chattels, rights, and credits of.....*John Myers*....., deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods and chattels, rights, and credits of the said deceased, which shall come to the hands, possession or knowledge of....*him*...., the said....*Henry Farber*...., as....*administrator*...., or to the hands of any person or persons for....*him*....and the same so made, do exhibit, or cause to be exhibited, in the....*Probate*....Court of the said County of ....*Cook*...., agreeably to law; and such goods and chattels, rights, and credits, do well and truly administer, according to law, and all the rest of the said goods and chattels, rights, and credits, which shall be found remaining upon the account of the said....*administrator*...., the same being at first examined and allowed by the Court, shall deliver and pay unto such person or persons, respectively, as may be legally entitled thereto; and further do make a just and true account of all....*his*....actings and doings therein, when thereunto required by the said Court, and if it shall appear that any last will and testament was made by the deceased, and the same be proved in Court, and letters testamentary or of administration be obtained thereon, and the said....*James Farber does*....in such case, on being required thereto, render and deliver up the letters of administration, granted to....*him*....as aforesaid, and shall in general do and perform all other acts which may at any time be required of....*him*.... by law, then this obligation to be void; otherwise to remain in full force and virtue.

HENRY FARBER.....[SEAL]
Residence.....*25 E. Illinois Street, Chicago*.....
JAMES JORDAN.....[SEAL]
Residence....*53 N. La Salle Avenue, Chicago*....
FRANK SMITH.....[SEAL]
Residence.....*625 Simpson Street, Evanston*.....

....*I*....do solemnly swear that....*I*....will well and truly administer all and singular the goods and chattels, rights, credits, and effects of ....*John Myers*...., deceased, and pay all just claims and charges against ....*his*....estate, so far as....*his*....goods, chattels, and effects shall extend, and the law charge....*him*....; and that....*I*....will do and perform all other acts required of...*me*...by law, to the best of....*my*.... knowledge and abilities.

Subscribed and sworn to before me, ...*John A. Cervenka*...., Clerk of the....*Probate*.... Court of....*Cook*....County, this....*fifth*.... day of....*July*....A. D....*1914*....
JOHN A. CERVENKA....
CLERK

} ....*HENRY FARBER*....

[SEAL OF THE COURT]

NOTE. Acknowledgment of all the signers to the bond should be taken before an authorized official. See No. 17.

108. Appeal Bond.

KNOW ALL MEN BY THESE PRESENTS, That we, ...*Henry Jones*...., of....*Chicago*...., in the County of....*Cook*....and State of ....*Illinois*...., as principal, and....*National Surety Company of Illinois*,...., as surety, are held and firmly bound unto....*Frank Devine, administrator of the estate of Herman Schmidt, deceased*...., also of the....*same County and State*...., in the penal sum of....*Seven Thousand* (*$7,000.00*).... Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

WITNESS our hands and seals this....*tenth*....day of....*June*.... A. D....*1914*....

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH That WHEREAS, the said....*Frank Devine*....did on the....*tenth*....day of ....*May*....A. D....*1914*...., in the....*Superior*....Court of....*Cook*.... County, in the State aforesaid, and at the....*May*....Term thereof, A. D. ....*1914*...., recover a judgment against the said....*Henry Jones*....for the sum of....*Six Thousand* (*$6,000.00*)....Dollars and ....*no*....Cents, besides cost of suit, from which said judgment of the....*Superior*....Court of....*Cook*....County, the said....*Henry Jones has*....prayed for and obtained an appeal to the....*Appellate Court*....within the....*First District*....of said State.

NOW, THEREFORE, if the said....*Henry Jones*....shall duly prosecute the said Appeal, with effect, and moreover pay the amount of the judgment, costs, interests and damages rendered and to be rendered against ....*him*....in case the said judgment shall be affirmed in said....*Appellate Court*...., then the above obligation to be void, otherwise to remain in full force and virtue.

HENRY JONES.....[SEAL]

[CORPORATE SEAL] *NATIONAL SURETY COMPANY*....[SEAL]

Attest: By.....*Harry Peabody, President*.....

....*William Fair, Secretary*....

109. Attachment Bond.

KNOW ALL MEN BY THESE PRESENTS, That we, ...*Albert Smith, Henry Ward, and James Bart*...., of....*Chicago*...., in the County of ....*Cook*....and State of....*Illinois*...., are held and firmly bound unto ....*Oscar Jones*....in the penal sum of....*Five Hundred* (*$500.00*).... Dollars and....*no*....Cents, lawful money of the United States, for the payment of which said sum, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

SEALED with our seals, and dated this....*fourth*....day of....*August*.... A. D....*1914*....

THE CONDITION OF THIS OBLIGATION IS SUCH That, WHEREAS, the above bounden....*Albert Smith has*....on the day of the date hereof, prayed an Attachment out of the.....*Circuit*.....Court of.....*Cook*..... County, at the suit of....*Albert Smith*....against the estate of the above-

named....*Oscar Jones*....for the sum of....*Two Hundred* (*$200.00*).... Dollars and....*Sixty*....Cents, and the same being about to be sued out of said Court, returnable on the....*tenth*....day of....*September*....A. D. ....*1914*...., to the Term of the said Court then to be holden: NOW if the said....*Albert Smith*....shall prosecute....*his*....said suit with effect, or, in case of failure therein, shall well and truly pay and satisfy the said ....*Oscar Jones*....for all costs in said suit, and such damages as shall be awarded against the said....*Albert Smith, his*....heirs, executors or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said Attachment, then the above obligation to be void; otherwise to remain in full force and effect.

ALBERT SMITH....[SEAL]
HENRY WARD.....[SEAL]
JAMES BART.....[SEAL]

Signed, Sealed and Delivered in the Presence of
....*JOHN ROWE*....

Where the owner of the goods attached desires to keep them, pending outcome of the suit, his application should be accompanied by a bond drawn in the following form, known as a Sheriff's Forthcoming Bond on Attachment:

KNOW ALL MEN BY THESE PRESENTS, That we....*Henry Price, Harry Wood, and Frank Williams*....are held and firmly bound unto ....*Michael Zimmer*...., Sheriff of the County of....*Cook*...., in the State of....*Illinois*...., and to his executors, administrators and assigns, in the penal sum of....*Five Hundred* (*$500.00*)....Dollars, lawful money of the United States, for the payment of which sum we hereby jointly and severally bind ourselves, our heirs, executors and administrators.

WITNESS our hands and seals this....*tenth*....day of....*August*...., A. D....*1914*....

THE CONDITION OF THIS OBLIGATION IS SUCH, That WHEREAS, on the....*fourth*....day of....*August*...., A. D....*1914*...., a certain Writ of Attachment issued out of the....*Circuit*....Court of ....*Cook*....County, at the suit of....*Albert Smith, Plaintiff*...., against the estate of....*Oscar Jones, Defendant*...., directed to the Sheriff of....*Cook*....County to execute; by virtue of which said Writ the said Sheriff, ...*Michael Zimmer*...., has attached the following described property, to wit: ....*seven bales of cotton*....

And the said....*Henry Price*...., in whose possession the said property was found, being desirous of retaining the custody thereof, according to the provisions of the Statute:

NOW, if the said estate and property shall be forthcoming to answer the judgment of the Court in said suit, then this obligation to be void; otherwise to remain in full force and effect.

HENRY PRICE.....[SEAL]
HARRY WOOD.....[SEAL]
FRANK WILLIAMS....[SEAL]

NOTE. The above Forthcoming Bond may be used in connection with other suits than those in attachment.

110. Conservator's Bond.

KNOW ALL MEN BY THESE PRESENTS, That we, ...*John Ward, Carl Frank, and Fred Smith*...., of the County of....*Cook*....and State of....*Illinois*...., are held and firmly bound unto the People of the State of....*Illinois*...., for use of....*Henry Jones, a lunatic*...., in the penal sum of....*Fifteen Thousand* (*$15,000.00*)....Dollars, current money of the United States, for which payment, well and truly to be made and performed, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

WITNESS our hands and seals this....*first*....day of....*June*....A. D. ....*1914*....

THE CONDITION OF THIS OBLIGATION IS SUCH That if the above bounden....*John Ward*...., who....*has*....been appointed....*conservator*....of....*Henry Jones*....shall faithfully discharge the office and trust of such....*conservator*....according to law, and shall make a true inventory of all the real and personal estate of the said ward as shall come to....*his*....possession or knowledge, and return the same unto the....*Probate*....Court of....*Cook*....County, at the time required by law, and manage and dispose of all such estate according to law, and for the best interest of said ward, and faithfully discharge....*his*....trust in relation thereto, and render an account on oath of the property in....*his*....hands, and of the management and disposition of all such estate, within one year after....*his*....appointment, and at least once each year thereafter, and as much oftener as the Court may require, and upon removal from office, or at the expiration of....*his*....trust, settle....*his*....accounts in said Court, and pay over and deliver all the estate, title, papers and effects remaining in ....*his*....hands, or due from....*him*....on such settlement, to the person or persons lawfully entitled thereto, then this obligation shall be void; otherwise to remain in full force and virtue.

JOHN WARD .....[SEAL]
Residence.....*218 Hill Street, Wilmette, Illinois*.....
CARL FRANK.....[SEAL]
Residence....*1011 W. Goethe Street, Chicago, Illinois*....
FRED SMITH.....[SEAL]
Residence.....*412 W. Ohio Street, Chicago, Illinois*.....

NOTE. Acknowledgment before authorized official should accompany. See No. 17.

111. Executor's Bond.

KNOW ALL MEN BY THESE PRESENTS, That we, ...*Henry Smith*....as principal, and....*Fred Ward and John Smith*...., as sureties, and all within the County of....*Cook*....and State of....*Illinois*...., are holden and stand firmly bound and obliged unto....*Charles Cutting*...., Judge of the....*Probate*....Court in and for the County of....*Cook*...., in the full and just sum of....*Seven Thousand* (*$7,000.00*)....Dollars, to be paid to said Judge and his successors in said office; to the true payment

whereof we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally by these presents.

WITNESS our hands and seals this....*fifth*....day of....*June*....A. D. ....*1914*....

THE CONDITION OF THIS OBLIGATION IS SUCH That if the above bounden....*Henry Smith*...., executor of the last will and testament of....*Albert Smith*...., late of....*Cook*....County, deceased, testate, shall,—

FIRST, Make and return to the....*Probate*....Court for said County of ....*Cook*...., within....*three months*....from his appointment, a true inventory of all the real estate and all the goods, chattels, rights and credits of said testator, which are by law to be administered, and which shall have come to his possession or knowledge;

SECOND, Administer according to law and the will of said testator all the goods, chattels, rights, and credits, and the proceeds of all the real estate that may be sold for the payment of debts or legacies, which shall come to the possession of said executor, or of any other person for him; and,

THIRD, Render upon oath a just and true account of his administration within....*one year*...., and at any other times when required by said Court; then this obligation to be void; otherwise to remain in full force and virtue.

HENRY SMITH....[SEAL]
FRED WARD.....[SEAL]
JOHN SMITH.....[SEAL]

NOTE. Acknowledgment before authorized official should accompany. See No. 17.

112. Injunction Bond.

KNOW ALL MEN BY THESE PRESENTS, That we, ...*Henry Jones, Albert Ward, and Henry Smith*...., of the County of....*Cook*....and State of....*Illinois*...., are held and firmly bound unto....*John Smoot*...., of the....*County and State aforesaid*...., in the sum of....*Three Thousand* (*$3,000.00*)....Dollars, to be paid to the said....*John Smoot, his*.... executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, jointly and severally, and our respective heirs, executors and administrators, firmly by these presents.

SEALED with our seals, and dated this....*first*....day of....*June*.... A. D....*1914*....

WHEREAS, the above bounden....*Henry Jones has*....filed a bill of complaint in the....*Circuit*....Court of....*Cook County*....and State of....*Illinois*...., against the above named....*John Smoot*...., praying, among other things, for an injunction to restrain....*John Smoot from practicing his profession as a surgeon in the County of Cook of the State of Illinois*....

AND WHEREAS said Court has allowed an injunction for that purpose, according to the prayer of said bill, upon the said....*Henry Jones*.... giving bond and security as provided by law:

NOW, THEREFORE, *THE CONDITION OF THE ABOVE OBLIGATION IS SUCH* That if the above bounden....*Henry Jones, Albert Ward and Henry Smith*...., and their executors or administrators, or any of them, shall and do well and truly pay, or cause to be paid to the said ....*John Smoot, his*....executors, administrators, or assigns, all damages which may be sustained by the said....*defendant*....by reason of the wrongful issuing of such injunction, and also, all such costs and damages as shall be awarded against the said....*complainant, Henry Jones*...., in case the said injunction shall be dissolved; and also the sum of....*One Hundred* (*$100.00*)....Dollars, as attorney's fees to such....*solicitor*.... as....*defendant*....may employ or designate, then the above obligation to be void; otherwise to be and remain in full force and virtue.

HENRY JONES ....[SEAL]

Approved: *ALBERT WARD*....[SEAL]

....*ALBERT WALKER*....JUDGE. *HENRY SMITH*....[SEAL]

113. Removal Bond.

KNOW ALL MEN BY THESE PRESENTS, That we, ...*Charles Anderson Auto Company, a corporation*....*of*....*New York County, New York*...., as principal, and....*American Surety Company of New York*.... as surety, are held and firmly bound unto....*John Adams*....and all other persons whom it may concern, in the penal sum of....*Five Hundred* (*$500.00*)....Dollars, for the payment of which, well and truly to be made, we hereby bind ourselves, our successors, heirs, legal representatives and assigns, jointly, severally and firmly by these presents.

IN WITNESS WHEREOF, the said....*Charles Anderson Auto Company has*....caused this instrument to be executed by....*its President*.... and attested by....*its Assistant Secretary*....and....*its corporate*.... seal to be hereunto affixed, and the said....*American Surety Company has*....caused this instrument to be executed by....*its Vice-President*.... and attested by....*its Assistant Secretary*...., and....*its corporate*.... seal to be hereunto affixed this....*tenth*....day of....*July*....A. D. ....*1914*....

THE CONDITION OF THIS OBLIGATION IS SUCH That, WHEREAS, The said....*Charles Anderson Auto Company*...., the principal above named, ...*has*....petitioned the....*Superior*....Court of the County of....*Cook*....in the State of....*Illinois*....for the removal of a certain cause therein pending, wherein....*John Adams is plaintiff*...., and....*Charles Anderson Auto Company is defendant*...., into the District Court of the United States, in and for the....*Eastern Division of the Northern*....District of the State of....*Illinois*....

NOW, THEREFORE, If the above bounden....*Charles Anderson Auto Company*....shall enter in the said District Court of the United States, within thirty days from the date of the filing of said petition, a certified copy of the record in said suit and shall pay all costs that may be awarded by said District Court of the United States, if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear in said District Court and enter special bail in such cause,

if special bail was originally required therein, and shall do such other appropriate acts as by the Acts of Congress are required to be done upon the removal of such suit from said State Court to said District Court, then this obligation to be void, otherwise to remain in full force, effect and virtue.

[CORPORATE SEAL] *CHARLES ANDERSON AUTO COMPANY....,*
Attest: *By....Charles Anderson, President.....*
....HENRY SMITH, Assistant Secretary.....
[CORPORATE SEAL] *AMERICAN SURETY COMPANY.....,*
Attest: *By....Walter Brown, Vice-President....*
....WILLIAM HENRY, Assistant Secretary....
Approved:
*....CHARLES A. GIBBONS....*JUDGE.

C. Depositions.

114. Dedimus for Oral Interrogatories.

STATE OF....*ILLINOIS....*}
County of ..... *Cook .....*} ss.

The People of the State of....*Illinois....*

TO....*John Ward, Notary Public....*, in and for....*Bond....*County, *....Wisconsin....*:

WHEREAS, It has been represented to us that....*May Smith is a....* material...*witness*...in a certain case now pending in our...*Superior*... Court of....*Cook*....County, in and for the State of....*Illinois....*, between....*Frank Smith, plaintiff....*, and....*Fred Mark, defendant....*, and that the said...*witness resides*...at...*Charles City*...in...*Bond*... County aforesaid, without the said State of....*Illinois....*, and that *....her*....personal attendance cannot be procured at the trial of the said cause: Now, know ye, that we, having confidence in your prudence and fidelity, have appointed you....*Commissioner*....to examine the said *....witness....*, and do therefore authorize and require you to cause the said....*witness*....to come before you at the office of....*James Clarke....*, No....*724 W. Huron*....Street, in the....*City*....of....*Charles City*.... aforesaid, and on the oath or affirmation of said....*witness....*, by you first duly in that behalf administered, faithfully to take the....*deposition*....of the said....*witness*....upon all interrogatories to be propounded to....*her*....orally, pursuant to the notice attached to these Presents, both on the part of the said....*plaintiff*....and of the said....*defendant....*, and none others, on the....*fourth*....day of....*June*....A. D....*1914*...., and to continue said examination from day to day until completed; and the same when thus taken, together with this commission and all exhibits and the said interrogatories, to certify into our said....*Superior*....Court of....*Cook*....County with the least possible delay.

WITNESS, ...Charles W. Vail...., Clerk of said Court, and the seal thereof, at....*Chicago....*, in said County, this....*first*....day of....*May*....A. D....*1914*....

[SEAL OF THE COURT]

CHARLES W. VAIL....,
CLERK.

115. Dedimus Notice.

STATE OF....*ILLINOIS*....}
County of ..... *Cook* .....} ss.

....*Superior*....Court of....*Cook*....County,
....*April*....Term, A. D....*1914*....

....*Frank Smith*....
v.
....*Fred Mark*.....

TO....*Henry Clark, Attorney for Fred Mark, defendant*....

TAKE NOTICE, That on the.....*first*.....day of.....*May*.....A. D. ....*1914*....at....*ten*....o'clock in the....*fore*....noon, or as soon thereafter as counsel can be heard, the undersigned will sue out of the office of the Clerk of said Court a Dedimus Potestatem or Commission under the seal of said Court, directed to....*John Ward, Notary Public*...., of....*Charles City*....in the County of....*Bond*....and State of....*Wisconsin*...., or to any Judge, Master in Chancery, Notary Public, or Justice of the Peace of the County last named, to take the....*deposition*....of....*May Smith*.... upon interrogatories to be propounded to said....*witness*...., orally, to be read in evidence on the part of the said....*Frank Smith*....on the trial of the above entitled cause.

FURTHER, TAKE NOTICE, That said....*deposition*....will be taken at the office of....*James Clarke*...., No....*724 W. Huron*....Street, in the....*City*....of....*Charles City*....aforesaid; and the examination of said....*witness*....under said commission will be begun the....*fourth*.... day of....*June*....A. D.....*1914*....at....*ten*....o'clock....*A*....M., and will continue from day to day until completed, at which time and place you may appear and cross-examine, if you see fit.

DATED....*April thirtieth*....A. D....*1914*....

JOHN HILLIS.....
....*Attorney*....for....*Complainant*....

116. Deposition Certificate.

STATE OF.....*WISCONSIN*.....}
County of ..... *Bond* .....} ss.

I, ...*John Ward, Notary Public*...., in and for said County, DO HEREBY CERTIFY that the above deposition was taken before me at ....*the office of James Clarke*....in the....*City*....of....*Charles City*.... in said County on the....*fourth*....day of....*June*....A. D....*1914*.... at....*ten*....o'clock....*A*....M.; that it was taken at the request of the ....*plaintiff*....upon....*verbal*....interrogatories; that it was reduced to writing by....*John Jones*....[1](in my presence, under oath truthfully to transcribe); that it was taken to be used in the action of....*Frank Smith against Fred Mark*....now pending in the.....*Superior*.....Court of ....*Cook*....County, ...*Illinois*....; that the reason for taking it was to get the testimony of....*May Smith*...., residing in....*Bond*....County,

[1] Where taken down by Notary, part in parentheses may be omitted.

....*Wisconsin*....; that [1](a notice, of which the annexed[2] is a copy, was served upon....*Fred Mark*....on the....*fifth*....day of....May....A. D. ....*1914*....); that said deponent before examination was sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause, and that said deponent was carefully read....*by*....said deponent and then subscribed by....*her*....

[NOTARIAL SEAL] *JOHN WARD*....

117. Deposition Notice.

STATE OF....*ILLINOIS*....
County of ..... *Cook* ..... } ss.

In the....*Superior*....Court of....*Cook*....County,
....*April*....Term, A. D....*1914*....

....*Frank Smith*....
v.
....*Fred Mark*....
} Gen. No....*272163*....

To....*Henry Clark, Attorney for Fred Mark, defendant*....

TAKE NOTICE, That on the.....*first*.....day of.....*May*.....A. D. ....*1914*...., at....*ten*....o'clock in the....*fore*....noon, or as soon thereafter as counsel can be heard, the undersigned will sue out of the office of the Clerk of said Court, a Dedimus Potestatem, or commission under the seal of said Court, directed to....*John Ward, Notary Public*...., of....*Charles City*....in the County of....*Bond*....and State of....*Wisconsin*...., or to any Judge, Master in Chancery, Notary Public, or Justice of the Peace of the County last above mentioned, to take the...*deposition*... of....*May Smith*....upon the interrogatories hereto attached, to be read in evidence on the part of the....*plaintiff*....on the trial of the above entitled cause now pending in the said.....*Superior*.....Court on the ....*Law*....side thereof; when and where you can appear and file cross interrogatories, and join in said commission, if you wish.

DATED this....*fifth*....day of....*May*....A. D....*1914*....

JOHN HILLIS.....
....*Attorney*....for....*Complainant*....

....*I, Henry Clark*...., hereby acknowledge service of the foregoing Notice and attached Interrogatories, by a copy thereof, this....*fifth*.... day of....*April*....A. D....*1914*....

HENRY CLARK.....
....*Attorney*....for....*Defendant*....

NOTE. Where acknowledgment of service is refused, affidavit of service may be made. See No. 167.

[1] Where other party appears or deposition is taken by stipulation, statement to either effect may be substituted for part in parentheses.

[2] Copy of No. 117.

D. (a) Pleadings—Affidavits.

118. Affidavit for Attachment.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....
City of.....*Chicago*.....
....*First*....District.....
} ss.

In the....*Municipal*....Court of....*Chicago*....

.....*William Prince*.....
v.
....*Harry Albertson*....
} Gen. No....*317621*....

.....*William Prince*....., being duly sworn, deposes and says that ....*Harry Albertson is*....indebted to....*him*...., after allowing all just credits and set-offs, in the sum of....*One Hundred Fifty* (*$150.00*).... Dollars and....*no*....Cents, and that the nature of plaintiff's said claim is upon....*a promissory note*....given....*August fourth*....A. D....*1912*.... to cover indebtedness contracted by said....*Harry Albertson*....for goods furnished to said....*Harry Albertson*....at....*his*....request; and affiant further states that the said[1]....*Harry Albertson is*....not....*a resident*....of this State, and that....*his place*....of residence....*is Cedar Rapids, Iowa*....; that upon diligent inquiry, affiant has not been able to ascertain....*his*....place of residence; that....*he has concealed himself and stands*....in defiance of an officer, so that process cannot be served upon....*him*....; that....*he has*....departed from this State with the intention of having....*his*....effects removed from this State; that....*he is*....about to depart from this State with the intention of having....*his*.... effects removed from this State; that...*he is*...about to remove...*his*... property from this State to the injury of the said....*William Prince*....; that....*he has*....within two years last past, fraudulently conveyed or assigned....*his*....effects, or a part thereof, so as to hinder and delay ....*his*....creditors; that....*he has*....within two years last past fraudulently concealed or disposed of....*his*....property so as to hinder and delay....*his*....creditors; that....*he is*....about fraudulently to conceal, assign or otherwise dispose of....*his*....property or effects, so as to hinder and delay....*his*....creditors; that the debt sued for was fraudulently contracted on the part of the....*debtor*...., and that the statements of said....*Harry Albertson*....which constituted said fraud were reduced to writing and signed by....*Harry Albertson*....; and further deponent saith not.

WILLIAM PRINCE....[SEAL]

NOTE. Add acknowledgment before authorized official. See No. 17.

[1] The action of attachment is based on statutes, and the statutes of any jurisdiction should be consulted to determine upon what grounds the action may be brought. A number of grounds are given, but in any case only such should be used as are applicable.

119. Affidavit for Garnishment.

STATE OF....*ILLINOIS*....
County of..... *Cook* .....} ss.

....*Circuit*....Court of....*Cook*....County.

....*James Henry*....
v.
....*Fred Williams*....
and
....*Chicago Great Eastern Railroad Company*....
} Gen. No....*317621*....

....*James Henry*...., of said County, being duly sworn, says, that at the....*October*....Term of the....*Circuit*....Court of....*Cook*....County, A. D....*1914*...., a judgment was rendered in favor of....*James Henry*....and against....*Fred Williams*....for the sum of....*Two Hundred* (*$200.00*)....Dollars and....*Fifty*....Cents, debt, and....*Twelve* (*$12.00*)....Dollars and....*Sixty*....Cents, costs of suit; that execution has been duly issued on said judgment against said....*Defendant*...., which has been returned by....*Frank Zimmer*...., Sheriff of said County, "no property found"; and this affiant avers that said....*Defendant has*....no property within the knowledge of this affiant, in....*his*.... possession, liable to execution; but this affiant has just reason to believe that....*the Chicago Great Eastern Railroad Company is*....indebted to said....*Defendant*...., or....*has*....effects or estate of said....*Defendant*....in....*its*....hands.

Wherefore this affiant prays that said....*Chicago Great Eastern Railroad Company*....may be summoned personally to be and appear before the ....*Circuit*....Court of....*Cook*....County on the....*first*....day of the ....*next*....Term thereof, being the....*third Monday*....of....*December*....A. D....*1914*...., as garnishee agreeably to law.

JAMES HENRY....

NOTE. Acknowledgment before authorized official should accompany. See No. 17.

120. Affidavit for Replevin.

STATE OF....*ILLINOIS*....
County of..... *Cook* .....} ss.

....*Harry Warner*...., being duly sworn, ...*deposes and says*...., that ....*he is*....the....*owner*....and....*is*....now lawfully entitled to the possession of the following Goods and Chattels, viz.: ....*two* (*2*) *desks, five* (*5*) *chairs and two* (*2*) *beds*...., and that said Goods and Chattels are of the value of....*Two Hundred* (*$200.00*)....Dollars. That on the....*third*....day of....*August*....A. D....*1914, James Simpson*.... wrongfully took and wrongfully....*detains*....the said Goods and Chattels from....*this affiant*...., and that said Goods and Chattels have not been taken for any tax, assessment or fine levied by virtue of any law of this

State; nor seized under any execution or attachment against the Goods and Chattels of....*this affiant*....liable to execution or attachment, or held by virtue of any writ of replevin against....*this affiant*....

HARRY WARNER....

NOTE. Add acknowledgment before authorized official. See No. 17.

D. (b) Pleadings—Appellate.

121. Abstract, Skeleton.

In the....*Appellate*....Court of....*Illinois, First*....District
....*March*....Term, A. D....*1914*....
Gen. No....*65123*....

....*Henry Smith, Appellee*....
v.
....*Wardon Hotel Co., a corporation, Appellant*....

Appeal from....*Circuit*....Court of ....*Cook*....County. Hon....*John P. Hand*...., Judge, Presiding.

Placita; Praecipe; Summons; Declaration; Plea of general issue; Jury impanelled and sworn; Jury retire to consider their verdict; Verdict of jury; Motion for new trial; Motion for new trial overruled, exception; Motion in arrest of judgment overruled, exception; Judgment on verdict, exception; Prayer for allowance of appeal; Bond,.....*Ten Thousand* (*$10,000.00*).....Dollars, to be approved by Court and filed within ....*thirty*....days, and leave given to file Bill of Exceptions within ....*sixty*....days; Appeal bond approved and filed; Bill of Exceptions filed; Bill of Exceptions, including various instructions, offered by the parties, and exceptions to certain ones given by the Court and to the refusal of certain ones by the Court; Certificate of presiding judge that the Bill of Exceptions contains all of the evidence heard and all the instructions modified, given or refused; Exhibits of the parties; Notice for praecipe of record; Praecipe of record; Certificate of....*J. W. Rainey*...., clerk of ....*Circuit*....Court of....*Cook*....County that the record is a true, perfect and complete transcript; Assignment of errors (see No. 122).

122. Assignment of Errors.

(For position in Abstract, see No. 121.)

Now....*comes appellant, Wardon Hotel Co., a corporation*...., by ....*James & Leonard, its attorneys*...., and....*assigns*....error upon the record, judgment and proceeding in said....*Circuit*....Court, as follows:

(1) The verdict and judgment are against the law in the case.

(2) The verdict and judgment are contrary to the evidence in the case.

(3) The verdict and judgment are contrary to the weight of the evidence.

(4) The Court admitted incompetent and improper evidence introduced by plaintiff over the objection of the defendant.

(5) The Court refused to exclude and strike out incompetent, irrelevant and immaterial evidence prejudicial to the rights and interests of the defendant.

(6) The Court refused to admit proper and competent evidence offered by the defendant.

(7) The Court erred in overruling defendant's motion for a peremptory instruction at the close of plaintiff's evidence.

(8) The Court erred in marking "Refused" the written instruction tendered by the defendant at the close of the plaintiff's evidence.

(9) The Court erred in overruling defendant's motion for peremptory instruction at the completion of all of the evidence offered in the case.

(10) The Court erred in marking "Refused" the written instruction tendered by the defendant at the completion of all of the evidence in the case which was accompanied by a proper written motion requesting that said instruction be marked "Given and read to the jury."

(11) The Court erred in refusing proper instructions asked on behalf of the defendant.

(12) The Court erred in marking "Given" and in giving to the jury erroneous instructions on behalf of the plaintiff.

(13) The Court erred in refusing to mark "Given" and in not giving to the jury instruction Number....*4*....as tendered by the defendant and in modifying same and in giving same to the jury as so modified.

(14) There is no evidence in the record to support the verdict and judgment.

(15) The Court erred in overruling defendant's motion for new trial.

(16) The Court erred in overruling defendant's motion in arrest of judgment.

(17) The Court erred in entering judgment on the record.

(18) Counsel for plaintiff made improper and prejudicial remarks in the presence of the jury.

(19) The Court erred in overruling the motion of the defense to withdraw a juror and continue the cause on account of the improper conduct of counsel for plaintiff in asking improper and prejudicial questions of jurors upon their voir dire.

(20) The judgment is for an excessive amount.

JAMES & LEONARD.....
....*Attorneys*....for....*Appellant*....
MARTIN JAMES...., of Counsel.

123. Bill of Exceptions, Caption and Conclusion.

STATE OF....*ILLINOIS*... }
County of ..... *Cook* ..... } ss.

In the....*County*....Court of....*Cook*....County, ...*May*....Term.

....*Mrs. James M. Seymour*....
v. } Gen. No....*67561*....
.....*Henry Smith*.....

Be it remembered, that hereafter, to wit: On the....*second*....day of ....*May*....A. D....*1914*...., being one of the days of said Term, of said Court, before his Honor, ...*George M. Hardy*...., Judge of said Court, and a jury, this cause came on for trial upon the pleadings heretofore

filed herein. Mr....*William Baker*....appearing for plaintiff; Mr....*Everett Jones*....appearing for defendant.

And thereupon the plaintiff, to maintain the issues on....*her*....part, introduces the following evidence, to wit: (Stenographic transcript of the evidence follows).

The foregoing is all the evidence offered or received on the trial of the above entitled cause.

GEORGE M. HARDY.....[SEAL]
Judge of the....*County*....Court.

O. K.
....*WILLIAM BAKER*.....
....*Attorney*....for....*Complainant*....

O. K.
....*EVERETT JONES*.....
....*Attorney*....for....*Defendant*....

NOTE. It is the usual practice for the appellant's attorney to prepare the Bill of Exceptions, submit it to the opposing attorney for his perusal and O. K. The presiding judge then signs as a matter of course in the absence of a dispute between the parties. Where there is a controversy as to any particular evidence, the presiding judge may determine the matter from his own recollection or in other ways. Statutes usually govern the matter, and there are numerous decisions in regard to the proper course to be taken. Mandamus may be resorted to in some cases to compel the presiding judge to sign.

124. Brief, Skeleton.

In the....*Appellate*....Court of....*Illinois, First*....District
....*March*....Term, A. D....*1913*....
Gen. No....*11633*....

....*James Smith, Appellee*....
v.
....*Wardon Hotel Co., a corporation, Appellant*....

Appeal from....*Circuit*....Court of ....*Cook*....County. Hon....*John P. Hand*...., Judge, Presiding.

STATEMENT.

(A) Pleadings. (B) Facts. (C) Contentions of appellant.

POINTS AND AUTHORITIES.

Contention No. 1, with authorities. Contention No. 2, with authorities. Contention No. 3, with authorities. Contention No. 4, with authorities, etc.

ARGUMENT.

In order outlined in POINTS AND AUTHORITIES.

CONCLUSION.

We therefore respectfully ask that this Court reverse the judgment entered herein, with a finding of fact in favor of the defendant; or if the

Court does not feel that it would be justified by the facts in so doing, that it should remand the case for a fair and impartial trial before an unprejudiced jury, on proper evidence and under correct instructions as to the law.

Respectfully submitted,

JAMES & LEONARD.....
....*Attorneys*....for....*Appellant*....

MARTIN JAMES...., of Counsel.

125. Writ of Error.

STATE OF....*ILLINOIS*....
....*Appellate*..... Court,
.....*First*..... District
} ss.

The People of the State of....*Illinois*....

To the Clerk of the....*Municipal*....Court of....*Chicago*....within and for the....*First*....District of said....*City*...., GREETING:

Because, in the Record and proceedings, as also in the rendition of the Judgment of a plea which was in the...*Municipal*...Court of...*Chicago*..., within and for the....*First*....District of said....*City*...., before the Judge thereof, between.....*Frank Adams, plaintiff*....., and.....*John Simpson, defendant*...., it is said manifest Error hath intervened, to the injury of the aforesaid....*defendant*...., as we are informed by....*his*.... complaint, and we being willing that Error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if Judgment thereof be given you distinctly and openly, without delay, send to our Justices, of the....*Appellate*.... Court the Record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at....*Chicago*...., in the County of....*Cook*...., on the ....*first Tuesday*....of....*October next*...., that the Record and proceedings, being inspected, we may cause to be done therein, to correct the Error, what of right ought to be done according to law.

WITNESS, The Hon....*Frank A. Brown*...., Presiding Justice of our Court, and the seal thereof, at....*Chicago*...., this....*fourth*....day of....*June*....A. D. ....*1914*....

[COURT SEAL]

FRANK R. PORTER....,
CLERK.

D. (c) (1) Pleadings—Chancery—Bills.

126. Bill for Divorce.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....
} ss.

In the....*Circuit*....Court of....*Cook*....County.

To the....*April*....Term, A. D....*1914*....

....*Alice Mann Perkins*....
v. } Gen. No....*613123*....
..... *Henry Perkins* .....

To the Honorable....*John Tuthill*...., Judge of said Court:

In....*Chancery Sitting*....

HUMBLY COMPLAINING Unto Your....*Honor*...., your....*Oratrix, Alice Mann Perkins*....of....*Evanston*...., in the County of....*Cook*.... and State of....*Illinois*...., respectfully shows that....*she*....is, and for more than a year last past, continuously, immediately preceding the filing of this bill of complaint, has been an actual resident of the State of ....*Illinois*....

Your....*Oratrix*....Further shows unto Your....*Honor*...., that on or about the....*first*....day of....*August*....A. D....*1907*...., at....*Chicago*...., in the State of....*Illinois, she*....was lawfully joined in marriage with....*Henry Perkins*...., of....*Evanston*...., in the State of ....*Illinois*...., whom your....*oratrix*....prays may be made a party defendant hereto, and from thence hitherto, until on or about the....*first*.... day of....*February*....A. D....*1912*...., your....*oratrix*....and the said defendant lived and cohabited together as husband and wife.

Your....*Oratrix*....Further shows unto Your....*Honor*...., that, as the fruits of said marriage, the parties hereto have had born unto them....*one child*...., who....*is*....now living, whose....*name and age*....are as follows, to wit: ....*Helen*...., aged....*three years and two months*....

Your....*Oratrix*....Further shows unto your....*Honor*...., that since said marriage, and during all the time....*she*....lived and cohabited with the said defendant, ...*she*....has treated....*him*....kindly and affectionately, and in all things, at all times, conducted....*herself*....toward the said defendant in a manner well becoming a good, true, and virtuous ....*wife*....

Your....*Oratrix*....Further shows unto Your....*Honor*....that the said defendant is the owner, in....*his*....own right, in fee simple, of the following described real estate, situate in the County of....*Cook*...., State of....*Illinois*...., to-wit: ....*Lots 4, 5, 6 of Parker's Resubdivision*....to the....*City*....of....*Evanston*...., of about the value of....*Ten Thousand* (*$10,000.00*)....Dollars; and the said defendant is also the owner of personal property, consisting of....*100 shares common stock, Chicago, Milwaukee and St. Paul Railway Company*...., of the probable value of ....*Thirteen Thousand* (*$13,000.00*)....Dollars; and the said defendant is also in the receipt of....*an annual*....income, derived from....*his occupation of physician*....; and your....*oratrix*....shows that....*she*....is possessed of....*no*....property, either real or personal, and has....*no*.... means wherewith to support....*herself*....and....*child*...., or to defray the costs and expenses of this proceeding; and that the defendant is abundantly able to supply all the necessities of....*herself*....and....*child*...., but wholly refuses so to do; and your....*oratrix*....charges that....*he*...., the said defendant, now threatens to, and is about to sell and dispose of, or incumber all....*his*....estate, real and personal property, for the purpose of defeating your....*oratrix's*....rights in the premises, and to pre-

vent....*her*....from obtaining alimony for the support of....*herself*.... and....*child*...., and for the payment of the costs and expenses of this proceeding, and your....*oratrix*....fears that....*he*....will do so, unless restrained by the injunction of this Honorable Court.

Your....*Oratrix*....Further shows unto Your....*Honor*...., and charges that the said defendant, on or about the.....*first*.....day of ....*February*....A. D....*1912*...., willfully, and without any reasonable or just cause therefor, deserted and abandoned your....*oratrix*....and wholly refused to live and cohabit with....*her*....any longer as husband and wife, and from thence hitherto, up to the time of filing this Bill of Complaint, has continuously absented....*himself*....from....*her*...., and refused to return and live with....*her*....as husband and wife, and still does, without any fault on the part of your....*oratrix*....

Your....*Oratrix*....Further shows unto Your....*Honor*...., and charges that the said defendant has been guilty of extreme and repeated cruelty to your....*oratrix*....; that the said defendant, on divers days and times since their said marriage, has beaten, struck, pinched, choked, kicked and otherwise cruelly abused and ill-treated your....*oratrix*...., and has used vile, abusive and opprobrious language toward....*her*...., and has at divers times threatened the life of your....*oratrix*...., so that....*her*.... life has been rendered miserable; and your.....*oratrix*.....shows and charges that, on or about the....*fifth*....day of....*January*....A. D. ....*1912*...., the said defendant....*kicked, beat and struck*....your ....*oratrix*....

Your....*Oratrix*....Further shows unto Your....*Honor*...., and charges that for the space of two years last past, prior to the filing of this Bill of Complaint, the said defendant has been guilty of habitual drunkenness.

Your....*Oratrix*....Further shows unto Your....*Honor*...., and charges that ever since the said marriage, ...*she*....has conducted and demeaned ....*herself*....toward the said defendant as a true, faithful, chaste and affectionate....*wife*...., but the said defendant, wholly regardless of ....*his*....marriage vows, has, for a considerable time past, given....*himself*....over to adulterous practices; that on or about the....*fourth*....day of....*December*....A. D....*1913*...., at....*Chicago*...., in the State of ....*Illinois*...., the said defendant committed adultery with one....*Hettie Adams*....and at divers other times and places since said marriage the said defendant committed adultery with one....*Lizzie Green*...., and with divers other....*lewd women*...., whose names are to your....*oratrix*.... unknown.

Your....*Oratrix*....Further shows unto Your....*Honor*...., and charges that the said defendant, at a term of the.....*Superior*.....Court of ....*Cook*....County, begun and holden within and for said County, on the....*first*....day of....*December*....A. D....*1913*...., was, on the ....*tenth*....day of....*December*....A. D....*1913*...., by the consideration and judgment of said Court, duly convicted of the crime of ....*forgery*...., and on the....*fifteenth*....day of....*December*....A. D. ....*1913*....the said defendant was, by the Judge of said Court, duly sentenced to confinement in the State Penitentiary for the term of

....*five*....years thereafter, which said judgment and sentence still remains in full force and effect, and not in any wise reversed, vacated or set aside, as by a certified copy of the record of said judgment and sentence, ready to be produced in Court, will more fully appear.

IN TENDER CONSIDERATION WHEREOF, And forasmuch as your ....*oratrix*....cannot have adequate relief in the premises, except in a court of equity, where matters of this nature are properly cognizable and relievable.

TO THE END, THEREFORE, That the said defendant may, if....*he*.... can, show why your....*oratrix*....should not have the relief herein prayed, and that....*he*....may full, true, direct and perfect answer make (but not under oath, answer under oath being hereby expressly waived) to all and singular the matters and things herein stated and charged.

AND That the said....*Henry Perkins*...., defendant, ...*his*....servants, agents, attorneys, and solicitors, may each and all of them be enjoined and restrained from incumbering, charging, selling, or otherwise disposing of, or from attempting to incumber, charge, sell, or otherwise dispose of any of the real or personal estate of the said....*Henry Perkins*....until the further order of this Court;

AND That the said....*Henry Perkins*....may be ordered to pay such sum as this Court shall deem reasonable and just for the support of your ....*oratrix*....and....*her child*....during the pendency of this proceeding; and a further sum for....*her*....costs and solicitor's fees in the prosecution of this case;

AND That upon a final hearing of this cause, the said....*Henry Perkins*....may be ordered, directed and decreed, to pay to your....*oratrix*.... such further sum, in the nature of alimony, for the support and maintenance of....*herself*....and....*child*...., as to this Court shall seem reasonable and just;

AND That the bonds of matrimony existing between your...*oratrix*.... and the said....*Henry Perkins*...., defendant, may be thenceforth and forever dissolved and annulled; and that all duties, rights, claims and obligations, accruing to either of the said parties by reason of said marriage, shall thenceforth and forever cease and be determined; and that the said parties be severally at liberty to marry again in like manner, as if they had never been married;

AND That your....*oratrix*....may have the sole care, custody, and education of the said....*child*....;

AND That your....*oratrix*....may have such further or other relief in the premises as to Your....*Honor*....shall seem meet, according to equity and good conscience;

MAY IT PLEASE Your....*Honor*....To grant unto your....*oratrix*.... the people's writ of injunction issuing out of and under the seal of this Honorable Court, to be directed to the said defendant, ...*Henry Perkins*...., and to....*his*....servants, agents, attorneys, and solicitors, therein and thereby commanding and strictly enjoining them, and each of them, from incumbering, charging, selling, or otherwise disposing of, or from attempting to incumber, charge, sell, or otherwise dispose of any of the real or

personal estate of the said defendant, ...*Henry Perkins*...., until the further order of the Court,

AND MAY IT PLEASE Your....*Honor*....To grant unto your ....*oratrix*....the writ of summons in chancery issuing out of and under the seal of this Honorable Court, to be directed to the said defendant, ...*Henry Perkins*...., therein and thereby commanding....*him*...., by a certain day, and under a certain penalty, to be therein inserted, that ....*he*....personally be and appear before this Honorable Court, then and there to stand to, abide and perform such order, direction and decree therein as to Your....*Honor*....shall seem meet, according to equity and good conscience.

AND Your....*Oratrix*...., As in duty bound, will ever pray, etc.

....*WILLIAM LONG*.... *ALICE MANN PERKINS*....

....*Solicitor*....for....*Complainant*....

STATE OF....*ILLINOIS*....
County of ..... *Cook* ..... } ss.

....*Alice Mann Perkins*...., being duly sworn, says that....*she*....is the Complainant whose name is subscribed to the foregoing Bill of Complaint; that....*she*....has heard the above Bill of Complaint read, and knows the contents thereof; that the said Bill of Complaint is true of....*her*....own knowledge, except as to the matters and things therein stated to be upon information and belief, and as to those matters and things....*she*.... believes it to be true.

ALICE MANN PERKINS....

NOTE. Should be acknowledged before authorized official. See No. 17. Naturally, only such of the above grounds as exist should be included, and other statutory grounds may be substituted, if any such there are. Not all the relief here prayed for need be included. Sometimes the wife does not request alimony, and it is seldom asked where the husband is suing the wife. Paragraphs as to property owned by defendant may in such cases be omitted.

127. Bill for Foreclosure of Mortgage.

STATE OF....*ILLINOIS*....
County of ..... *Cook* ..... } ss.

In the....*Circuit*....Court of....*Cook*....County.
At the....*May*....Term, A. D....*1914*....

....*Albert Bennett*, *Complainant*....
v.
....*Charles Bell*, *Defendant*....
} In....*Chancery*.... Gen. No....*1716*....

To the Honorable....*Judges*....of the....*Circuit*....Court of the County of.....*Cook*....., in the State of.....*Illinois*....., in.....*Chancery Sitting*....

Your....*orator, Albert Bennett*...., of the County of....*Cook*....and State of....*Illinois*...., respectfully....*represents*....unto the Court, that on the....*third*....day of....*June*....A. D....*1910, Charles Bell*...., of the County of....*Cook*....and State of....*Illinois*...., being indebted to your....*orator*....in the sum of....*Two Thousand* (*$2,000.00*)....Dollars, made and delivered to your....*orator his*....certain....*promissory note*.... of that date, and thereby promised to pay to your....*orator, four years*.... after date, the said sum of....*Two Thousand* (*$2,000.00*)....Dollars, with interest at the rate of....*six*....per cent per annum, as will more fully appear by the said....*note*...., ready to be produced in Court, and by the copy of the same herewith filed and marked "Exhibit A," and made part of this, your....*orator's*...., bill of complaint.

Your....*orator*....further....*represents*....unto the Court, that to secure the payment of the principal sum and interest above mentioned, the said....*Charles Bell and Helen Bell, his wife*...., on the....*third*....day of....*June*....A. D....*1910*...., by....*their*....deed of that date, conveyed to your....*orator*...., in fee simple, the following described parcel of land, with its appurtenances, situated in the said County of....*Cook*...., to wit: Lot....*Three* (*3*)...., Block....*Five* (*5*), *Henry's Addition*.... to the....*Village*....of....*Wilmette*.... Subject, however, to a condition of defeasance upon the payment of the principal sum and interest aforesaid, according to the tenor and effect of the said....*promissory note*....; which said deed was, on the....*fifth*....day of....*June*....A. D....*1910*...., duly acknowledged and afterward on the....*first*....day of....*August*.... A. D....*1910*...., filed for record in the....*Recorder's*....Office of the County of....*Cook*....aforesaid, as by the said deed and its accompanying certificates of acknowledgment and recording, ready to be produced in Court, and by a copy thereof herewith filed and marked "Exhibit B," and made a part of this bill, will more fully appear.

Your....*orator*....further....*represents*....unto the Court, that the said ....*Charles Bell has*....not yet paid the principal sum of....*Two Thousand* (*$2,000.00*).....Dollars or such interest thereon, or any part thereof, although the same long since became due; by means whereof the said mortgaged property has become forfeited, subject, notwithstanding, to redemption in equity by the said....*Charles Bell, his*....heirs and assigns.

Forasmuch, therefore, as your....*orator is*....without remedy in the premises, except in a Court of Equity, and to the end that the said....*Charles Bell and Helen Bell*...., who....*are*....made....*parties*....defendant to this bill, may be required to make full and direct answer to the same; but not under oath, the answer under oath being hereby waived; that an action may be taken in this behalf, by or under the direction of the Court; that the said....*defendant, Charles Bell*...., may be decreed to pay your ....*orator*....whatever sum shall appear to be due to....*him*....upon the taking of such action, together with the costs of this proceeding, by a sure day to be fixed by the Court; that in default of such payment the said mortgaged premises may be sold, as the Court may direct, to satisfy such debt and costs; that in case of such sale and of a failure to redeem therefrom pursuant to the suit, the....*defendants*...., and all persons acquiring

through or under....*them*...., after the commencement of this suit, may be forever barred and foreclosed of all right or equity of redemption of the said mortgaged property; and that your....*orator*....may have such other and further relief in the premises as equity may require, and to the Court shall seem meet.

MAY IT PLEASE the Court to grant the writ of summons in chancery directed to the sheriff of the said County of....*Cook*...., commanding him that he summon the said....*defendants, Charles Bell and Helen Bell*...., to appear before the said Court, on the first day of the term thereof to be held at the Court House in Chicago, in the County of....*Cook*....aforesaid, and then and there to answer this bill, etc.

HENRY JONES.....
....*Solicitor*....for....*Complainant*....

NOTE. Copies of the note and mortgage should be added as Exhibits A and B.

128. Bill of Interpleader.

(For heading, follow No. 126 or 127.)

Your....*orator, Aaron Bradford*...., of the County of....*Cook*....and State of....*Illinois*...., respectfully....*represents*....to Your....*Honors*.... that on the....*third*....day of....*January*....A. D....*1912*...., at....*Chicago, Illinois*...., your....*orator*....purchased of....*one Charles Denis*...., of.....*Chicago, Illinois, one*.....of the defendants hereinafter named, ...*two horses*...., for which....*he*....promised to pay the said....*Charles Denis*....the sum of....*Three Hundred* (*$300.00*)....Dollars, and gave .....*his notes*.....therefor, payable to the said.....*Charles Denis six months*....after date; that at the time of such purchase the said....*Charles Denis*.....represented, and still.....*insists*....., that.....*he was*.....the ....*owner*....of said property, and had good right to sell the same to your....*orator*....and to accept the said....*notes*....therefor.

And your....*orator*....further....*represents*....that afterward, on the ....*first*....day of....*February, one Edward Fanning*...., of....*Chicago, a defendant*....hereinafter named, made known and claimed, and still....*insists and claims*...., that....*he*...., the said....*Edward Fanning was*....at the time of said sale the real....*owner*....of said property, and that the said....*Charles Denis was*....not the....*owner*....thereof as....*he*....pretended to your....*orator*...., but....*was*....merely the ....*agent*....for the said....*Edward Fanning*....in making the said sale to your....*orator*....; and that the said....*Charles Denis*....had no authority to take such said....*notes*....in....*his*....own....*name*....; and that the said sum of....*Three Hundred* (*$300.00*)....Dollars was due and payable to....*him*...., the said....*Edward Fanning*...., and not to the said....*Charles Denis*....; and then and there notified your....*orator*...., in writing, not to pay the amount of said purchase money to the said ....*Charles Denis*....

Your....*orator*....further....*represents*....that the said....*Edward Fanning has*....commenced an action at law against your....*orator*....,

in the....*County*....Court in the County of....*Cook*...., to recover the purchase money due on said property, and that the said....*Charles Denis is*....now threatening to bring suit against your....*orator*....on the said ....*promissory notes*....

Your....*orator*.... further....*represents*....that....*he has*....always been willing to pay the amount of such purchase money to such person or persons as should be lawfully entitled to receive the same, and to whom ....*he*....could pay the same in safety; and....*he*....hereby....*offers*.... to bring the same into Court, as the Court shall direct.

And your....*orator*....further....*represents*....that....*he does*....not in any respect collude with....*either*....of the said named defendants, nor ....*has he*....exhibited this, ...*his*....bill of interpleader, at the request of....*either*....of the defendants, but merely of....*his*....own free will, to avoid being molested and harassed touching the matters contained herein.

FORASMUCH, THEREFORE, As your....*orator is*....without remedy in the premises, except in a Court of Equity; and to the end that the said ....*Charles Denis and Edward Fanning*...., who are made parties defendant to this bill, may be required to make full and direct answers to the same; and that the defendants may severally set forth to which of them the said sum of....*Three Hundred* (*$300.00*)....Dollars does of right belong, and if payable, and how in particular they make out their claim thereto; and that the defendants may interplead and settle and adjust their said demands between themselves; your....*orator*....being willing and desirous and agreeing, that the said sum may be paid to the....*one*....of them to which the same shall, in the judgment of the Court, appear of right to belong; and that your....*orator*....may be at liberty to bring and pay the said sum of....*Three Hundred* (*$300.00*)....Dollars in this Honorable Court, which your....*orator*....hereby....*offers*....to do, for the benefit of such defendant as shall appear to be entitled thereto and subject to the further order of the Court; and that the....*defendant, Edward Fanning*...., may be restrained by the injunction of this Court from proceeding against your....*orator*....in the said action at law before referred to, and that ....*both*....defendants may be restrained from commencing an action or actions against your....*orator*....for the recovery of said sum of....*Three Hundred* (*$300.00*)....Dollars or touching any matters or things aforesaid; and that the said....*Charles Denis*....may be decreed to deliver the said ....*promissory notes*....to your....*orator*....to be cancelled; and that your....*orator*....may have such other and further relief in the premises as equity may require and as to your Honors shall seem meet. (Conclude with prayer for process as in No. 127.)

JAMES BAKER.....
....*Solicitor*....for....*Complainant*....

STATE OF....*ILLINOIS*....
County of ..... *Cook* .....} ss.

....*Aaron Bradford*....on oath....*states*...., that....*he has*....exhibited....*his*....bill of interpleader against the defendants, ...*Charles Denis and Edward Fanning*...., named in the foregoing bill, without any

fraud or collusion between....*him*....and the said defendants or....*either*.... of them; and....*has*....not exhibited....*his*....said bill at the request of ....*either*....of said defendants; and further....*states*....that....*he has*....exhibited....*his*....said bill with no other intent but to avoid being sued or molested by the said defendants who are proceeding or threatening to proceed at law for the recovery of the fund mentioned in said bill. *AARON BRADFORD*....

NOTE. Should be acknowledged before an authorized official. See No. 17.

129. Bill for Mechanics' Lien, with Statement of Claim.

(For heading, see No. 126 or 127.)

Your....*orator, Frank Adams*...., of the....*City*....of....*Kankakee*...., County of....*Will*....and State of....*Illinois*...., respectfully ....*represents*....unto Your....*Honors*....that....*he is*....by occupation ....*a carpenter contractor*....; that on or about the....*first*....day of ....*May*....A. D....*1912, Henry Tallman*....of the....*City*....of ....*Kankakee*....in the County of....*Will*....and State of....*Illinois, one*....of the defendants hereinafter named, applied to your....*orator*.... to build for....*him a three-story brick office and residence structure*.... upon the premises hereinafter described; and thereupon your....*orator*....and the said....*Henry Tallman*....entered into a....*written*.... contract[1] (with drawings and specifications attached, a true copy of which contract is hereto attached, marked "Exhibit A," and made a part hereof, as will appear by the said contract, drawings and specifications, ready to be produced in Court, upon the hearing hereof).

Your....*orator*....further....*represents*....that immediately after the making of said contract, and in compliance with the terms thereof, ...*he*.... commenced work under the same on the following described premises, to wit: Lot....*Three* (*3*)...., Block....*Four* (*4*), *Ainslee's Addition*....to the ....*City*....of....*Kankakee*...., the said....*Henry Tallman*....being at the time, and still....*is*...., the....*owner*....of the said premises.

Your....*orator*....further....*represents*....that....*he*....did in compliance with the said contract, within the time specified, ...*build and finish*....for the said....*Henry Tallman*....on said premises....*a three-story brick building*....and did furnish all the necessary materials and labor for that purpose, and did in all respects comply with the terms of

[1] Where the contract is written, a copy of it should be attached as Exhibit A. The contract and the schedule, Exhibit B, are frequently given in what is called "a Statement of Claim" (see below), which may be filed to comply with a statutory limitation where it is not desired to start suit immediately. Where this "Statement of Claim" has been filed, it is frequently attached to the bill in lieu of Exhibits A and B. A mechanics' lien is purely statutory and the statutes must be consulted carefully in drawing forms in any jurisdiction.

the said contract and the specifications and drawings thereto attached, by ....*him*....required to be performed.

Your....*orator*....further....*represents*....that in accordance with the conditions of the said contract, your....*orator*...., on the....*first*....day of....*August*....A. D....*1913*...., procured from....*William Peckham*...., the architect and superintendent of the erection of the said building, a certificate in writing that your....*orator*....had completed....*his*....part of the said contract according to the terms and conditions thereof, which said certificate is now in the possession and control of your....*orator*....and ready to be produced on the hearing of this cause.

Your....*orator*....further....*represents*....that immediately after the completion of the said building, to wit: on the....*fifth*....day of....*August*....A. D....*1913*...., the said....*Henry Tallman*....accepted the same and took possession thereof, and has ever since occupied the same ....*as a place of business, together with certain tenants*....

Your....*orator*....further....*represents*....that the said....*Henry Tallman has*....only paid your....*orator*....the sum of....*Three Hundred* (*$300.00*)....Dollars on said contract and that there is now due to your ....*orator*....the sum of....*Fifteen Hundred* (*$1500.00*)....Dollars from the said....*Henry Tallman*...., together with interest thereon from the ....*first*....day of....*August*....A. D....*1913*...., and your....*orator attaches*....hereto a schedule marked "Exhibit B," and made a part of this bill, showing the amount due your....*orator*....under said contract, and all payments, with the dates thereof, made by the said....*Henry Tallman*....to your....*orator*.... (Attach copy of schedule as "Exhibit B."

Your....*orator*....further....*represents*....that all notices required by statute to be given, served or filed in order to establish a lien upon said premises have been given, served and filed as required by law.

Your ....*orator*.... further ....*represents*.... that ....*he has*.... frequently requested the said....*Henry Tallman*....to pay the said sum of ...*Fifteen Hundred* (*$1500.00*)...Dollars, the balance due your...*orator*... from....*him*....as aforesaid, but the said....*Henry Tallman has*....neglected and refused so to do; by means whereof your....*orator is*....entitled to a mechanics' lien upon the said premises for the amount due your ....*orator*....as aforesaid, under an act entitled "An Act to revise the law in relation to Mechanics' Liens," approved....*May 18, 1903*...., and in force....*July 1, 1903*....

Your....*orator*....further....*represents*....upon information and belief that....*Albert Cummings and Philip Jennings have or claim*....to have some interest in the said premises, as....*purchasers, mortgagees, judgment creditors, lessees*...., or otherwise, the precise nature whereof is unknown to your....*orator*....; but such interests, if any there be, have accrued since and are subject to the lien of your....*orator*....as aforesaid.

Your....*orator*....further....*shows*....that within four months after completion of said contract, and on the....*first*....day of....*October*.... A. D....*1913, he*....filed with the Clerk of the....*Circuit*....Court of said County in which said premises and improvements are situated, a claim for lien for the amount so due your....*orator*....as aforesaid, consisting of

a statement of your....*orator's*....contract, the date the same was made, and when completed, the balance due after allowing all credits, a sufficiently correct description of the said real estate to identify the same, and verified by the affidavit of....*himself*....

Your.....*orator*.....further.....*represents*.....that the Clerk of the ....*Circuit*....Court of said County, when such claim for lien for the amount so due your....*orator*....was filed for a lien, indorsed thereon the date of such filing, to wit: the....*first*....day of....*October*....A. D. ....*1913*...., and made an abstract thereof in a book kept for that purpose, properly indexed, containing the....*name*....of your....*orator*.... as the....*person*....filing the lien, the amount of the lien, to wit:.... *Fifteen Hundred* (*$1500.00*)....Dollars, the date of filing, to wit, on the ....*first*....day of....*October*....A. D....*1913*...., the name of the person, to wit: the said....*Henry Tallman*...., against whom the lien was filed, and a description of the above described premises, charged with your....*orator's*....lien; as by the records of the office of the said ....*Circuit*....Court in that behalf, or a certified copy of the same ready to be produced in Court on the hearing of this cause, as well as by a copy thereof hereto attached and made a part of this bill, marked "Exhibit C," will more fully appear. (Attach copy of record as "Exhibit C.")

FORASMUCH, THEREFORE, As your....*orator is*....without remedy in the premises except in a court of equity; and to the end that the said ....*Henry Tallman, Albert Cummings and Philip Jennings*...., who are made parties defendant to this bill, may be required to make full, direct and perfect answer to the same, but not under oath, the answer under oath being hereby expressly waived; that an account may be taken in this behalf under the direction of this Court; that your....*orator*....may be decreed to be entitled to a lien upon the said premises for the amount due your ....*orator*....under the said contract, in pursuance of the statute in such case made and provided, and that the....*defendant, Henry Tallman*...., may be decreed to pay your....*orator*....the amount due on said contract, with interest thereon, by a short day to be fixed by the Court, and that in default of such payment the said premises may be sold as the Court may direct, to satisfy such amount, interest and costs; that in case of such sale, and a failure to redeem therefrom pursuant to law, the defendants and all persons claiming through or under them, after the commencement of this proceeding may be forever barred and foreclosed of all right or equity of redemption of the said premises; and that your....*orator*....may have such other and further relief in the premises as equity may require, and to Your....*Honors*....shall seem meet. (Conclude with prayer for process as in No. 127.)

....*JOHN HAWLEY*..... *FRANK ADAMS*....
....*Solicitor*....for....*Complainant*....

STATEMENT OF CLAIM FOR A LIEN.

....*I*...., the undersigned, ...*Henry Ward*...., of....*Chicago*...., in the County of....*Cook*....and State of....*Illinois*...., make the following statement (under the law entitled "An Act to revise the law in relation to

Mechanics' Liens," approved....*May 18, 1903*...., and in force....*July 1, 1903*...., for a mechanics' lien for material furnished, manufactured and prepared, labor and services furnished and performed, and aver that the following described Real Estate, to-wit: .....*The South (S) One-Half* (½)...., Section....*Four (4)*...., Township....*Three (3)*...., Range ....*Six (6) East*....of the....*Third*....Principal Meridian in the County of....*Du Page*...., State of....*Illinois*...., now is, and at the date of the making of the contract hereinafter described, was owned by....*Frank Peters*....

That on the....*third*....day of....*June*....A. D....*1914*....said ....*Frank Peters*....made a....*written*....contract with the....*claimant to build a three-story frame dwelling house*....on the premises above described.

That the....*claimant was*....to complete the....*house*...., under said contract, on the....*first*....day of....*September*....A. D....*1914*...., and said....*Frank Peters*....agreed to pay the....*claimant*....therefor ....*Twelve Hundred ($1200.00)*....Dollars, final payment on the....*first*.... day of....*September*....A. D....*1914*...., and that....*claimant*....did complete the same on the...*tenth*...day of...*August*...A. D...*1914*...

That during said time, at the special instance and request of the said ....*Frank Peters*...., the....*claimant*....did work on said premises of the value of....*Eleven Hundred Forty ($1140.00)*....Dollars, as is shown by the following just and true statement thereof:

Materials.....	*Five Hundred Dollars*.....	*$ 500.00*
Labor.....	*Three Hundred Dollars*....	*300.00*
Services.....	*Three Hundred Dollars*....	*300.00*
Licenses and expenses....	*Forty Dollars*.....	*40.00*
		$1140.00

all which material, labor and services so furnished, were used in and about the erection and improvement of the building on said premises, and ....*affiant says*...., that the first of said material, labor and service was so furnished on the....*fifth*....day of....*June*....A. D....*1914*...., and the last of said material, labor and service was furnished on the....*tenth*.... day of....*August*....A. D....*1914*....

That there is now justly due and owing to the....*claimant*...., from the said....*Frank Peters*...., for the furnishing of said material, labor and service as aforesaid, after allowing to....*him*....all just credits, deductions and set-offs, the sum of....*Four Hundred ($400.00)*....Dollars and ....*Fifty*....Cents, all of which is still due and unpaid.

And the said....*Henry Ward*....now....*comes and claims*....a lien upon the said lands and improvements thereon, for the amount of....*his*.... claim, ...*Four Hundred ($400.00)*....*Dollars* and....*Fifty*....Cents, according to the statute in such cases made and provided.

HENRY WARD.....

STATE OF....*ILLINOIS*....}
County of ..... *Cook* .....} ss.

....*Henry Ward*...., being duly sworn, on oath....*says*...., that the foregoing statement of Claim for Lien, by....*him*....subscribed, is true; that the materials, labor and services therein mentioned were furnished to the said....*Frank Peters*....at the times and prices therein stated; that there is now due to....*this affiant*....the amount of money therein stated, and that the above and foregoing is a just and true statement of the material, labor and service furnished and performed as therein set forth.

HENRY WARD....

NOTE. Add acknowledgment before authorized official. See No. 17.

130. Bill for Partition.

(For heading, see No. 126 or 127.)

Your....*oratrix, Ann Baxter*...., and your....*orators, Bradford Baxter and Charles Baxter*...., of the County of....*Cook*....in the State of ....*Illinois*...., respectfully....*represent*....unto Your....*Honors*....that on the....*third*....day of....*June*....A. D....*1912, Edward Baxter*...., late of the County of....*Cook*....and State of....*Illinois*...., departed this life intestate, leaving your....*oratrix, Ann Baxter, his wife*...., and your....*orators, Bradford Baxter and Charles Baxter, his sons, and Fannie Baxter and Helen Baxter, his daughters*...., his only....*children*....and ....*heirs*....at law; that at the time of....*his*....death the said....*Edward Baxter*....was possessed and seized in fee simple of the following described real estate, to wit: Lots....*Five* (*5*), *Six* (*6*), *Seven* (*7*) *and Eight* (*8*)....of Block....*Six* (*6*), *Parker's Re-Subdivision*....to the ....*City*....of....*Evanston*...., and that the said....*Edward Baxter*.... derived title to the said premises by....*a warranty deed*....from....*one Henry Chadman*...., executed on the....*third*....day of....*October*.... A. D....*1902*....

And your....*oratrix and orators*....further....*represent*...., that no person or persons, other than your....*oratrix and orators*...., and the said ....*Fannie Baxter and Helen Baxter*...., have any interest in, or title to, the said described premises, or to any part thereof, in possession, remainder, reversion or otherwise.

Your....*oratrix and orators*....further....*represent*....that the said ....*Helen Baxter is*....a minor under the age of....*18*....years and that no legal guardian has been appointed for....*her*...., by reason whereof the said....*Helen Baxter is*....incompetent to join in a voluntary partition and division of said premises, and to set apart the dower of your ....*oratrix*....therein, or to consent to a sale thereof; and as your ....*oratrix and orators are*....advised, no valid division and partition, or assignment of dower, or sale of said premises can be effected without the aid or interposition of some court of competent jurisdiction.

FORASMUCH, THEREFORE, as your....*oratrix and orators are*.... without remedy in the premises, except in a court of equity; and to the end

that the said....*Fannie Baxter and Helen Baxter, who are*....made....*parties*....defendant to this bill, may be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby waived; that a guardian ad litem may be appointed by the Court for the said infant....*defendant*....; that the dower of your....*oratrix*....in the said premises may be assigned and set apart to....*her*....; and that a division and partition of the residue thereof may be made by and under the direction of this Court, between your....*orators, Bradford Baxter and Charles Baxter*...., and the....*defendants, Fannie Baxter and Helen Baxter*...., according to their respective rights and interests therein, to be judged by the Court; and that in case an assignment of dower, and division and partition in said premises cannot be made without manifest prejudice to the parties interested, that the same may be sold, under the direction of the Court, and the proceeds thereof distributed between the parties, according to their respective interests; and that your....*oratrix and orators*....may have such other and further relief in the premises as equity may require and to Your....*Honors*....shall seem meet. (Conclude with prayer for process as in No. 127.)

WILLIAM WARD.....
....*Solicitor*....for....*Complainants*....

D. (c) (2) Pleadings—Chancery—Notices.

131. Notice of Foreclosure of Mortgage.

....*August third*....A. D....*1914*....

To....*Charles Bell and Helen Bell*....,
....*Mortgagors*....,
No....*323 Linden Avenue, Wilmette, Illinois*....

You will take notice that as Agent for....*Albert Bennett, I*....have this day foreclosed the Mortgage heretofore given by you, dated....*June fifth*.... A. D....*1910*...., and recorded on....*June fifth*....A. D....*1910*...., on page....*120*....book....*One*....of Records in....*Cook*....County, on the property in the premises known as....*323 Linden Avenue*...., and that the sale under said Mortgage will be held at....*the Courthouse in the City of Chicago*....the....*fourth*....day of....*October*....A. D....*1914*...., at....*12*....M.

HENRY JONES.....
Agent for....*Albert Bennett*....
Mortgagee....

132. Notice to Owner of Mechanics' Lien for Material and Labor.

TO....*George B. Swift*....

YOU ARE HEREBY NOTIFIED, That....*I*....have been employed by ....*John Harding*....to furnish material and labor for the erection of

the....*cut stone*....on the building being erected for you by....*Henry Rogers and Company, a corporation*...., under....*its*....contract with you on your property....*at the Northwest (N. W.) corner of Dearborn and Harrison Streets*.....in the.....*City*.....of.....*Chicago*....., County of ....*Cook*....and State of....*Illinois*...., and that there....*will be*....due ....*me*....on the....*twelfth*....day of....*September*....A. D....*1914*.... therefor the sum of....*Five Hundred ($500.00)*....Dollars, and that ....*I*....shall hold the buildings and your interest in the grounds, liable for the amount that is due....*me*....on account thereof.

DATED this....*ninth*....day of....*August* ...A. D....*1914*....

WILLIAM JONES....

NOTE. See No. 129 and note concerning statutory requirements.

D. (c) (3) Pleadings—Chancery—Miscellaneous.

133. Answer.

(For heading, see No. 126 or 127.)

The answer of....*Charles Denis, defendant*...., to the bill of complaint of....*Aaron Bradford, complainant*....

....*This defendant*...., reserving to....*himself*....the right of exception to the said bill of complaint for insufficiency thereof in law or in fact, the same as if demurrer thereto had been filed, for answer thereto, ...*says*.... that....*he was*....and still....*is the holder*....of the....*promissory notes*....referred to in said bill of complaint; that said....*promissory notes were*....delivered to....*him*....in payment for....*two horses*....as set up in....*complainant's*....bill of complaint and that at the time of the sale of said....*horses*....to said....*complainant, he, Charles Denis, was*....the rightful owner of said....*horses*....and that....*they were his*....property and the property of no other person. And....*this defendant*....further answering....*prays*....that the said....*Aaron Bradford*....be directed to pay said....*Three Hundred ($300.00)*....Dollars to ....*him*....as the....*person*....rightfully entitled thereto.

HENRY WARD.....

....*Solicitor*....for....*Defendant*....

134. Order.

(For heading, see No. 126 or 127.)

AND THIS DAY COMES The complainant hereto, by....*William Long, her solicitor*...., and this cause coming on now to be heard upon the Bill of Complaint filed herein, taken as confessed against the defendant, and the Court, having heard all the evidence adduced herein by the complainant, and the same having been reduced to writing, and a certificate thereof filed herein, and having heard the arguments of Counsel, and being fully advised in the premises, finds said defendant....*to be guilty of said allegations in said bill*....

IT IS THEREFORE ORDERED, adjudged and decreed by the Court that the complainant be and....*she*....is hereby divorced from the defendant, and released from the obligations of....*her*....marriage and restored to all and singular the rights and privileges of an unmarried ....*woman, and she is hereby restored to her maiden name Alice Mann*....

ENTER: *JOHN TUTHILL*....
[SEAL OF COURT] JUDGE.

NOTE. This form will naturally vary considerably with the nature of the order to be entered.

135. Summons.

STATE OF....*ILLINOIS*....
County of ..... *Cook* .....} ss.

The People of the State of....*Illinois*....
To the Sheriff of said County, GREETING:

WE COMMAND THAT YOU SUMMON....*Charles Bell and Helen Bell*...., if....*they*....shall be found in your County, personally to be and appear before the....*Superior*....Court of....*Cook*....County on the first day of the term thereof, to be held at the Court House, in...*Chicago*..., in said County, on the....*first Monday*....of....*June*....A. D....*1914*...., to answer unto....*Albert Bennett*....in a certain....*original*....Bill of Complaint....*for Foreclosure of Mortgage*....filed in said Court, on the Chancery side thereof.

And have you then and there this Writ, with an endorsement thereon in what manner you shall have executed the same.

WITNESS, ...*RICHARD J. McGRATH*...., Clerk of our said Court, and the Seal thereof, at [SEAL OF COURT] ....*Chicago*...., aforesaid, this....*tenth*....day of ....*May*....A. D....*1914*....

RICHARD J. McGRATH....
CLERK.

136. Writ of Injunction.

STATE OF....*ILLINOIS*....
County of ..... *Cook* .....} ss.

The People of the State of....*Illinois*....
TO....*Henry Sayre*....and your Attorneys, Solicitors, Agents and Servants, and to each and every of them, GREETING:

WHEREAS, It hath been represented to the Honorable....*the Judges*.... of the....*Circuit*....Court of....*Cook*....County, in the State aforesaid, on the part of....*William Smith, complainant*...., in a certain Bill of Complaint, exhibited before said....*Judges*....and filed in said Court against you, the said....*bill charging*...., among other things, that you are combining and confederating with others to injure the....*complain-*

ant...., touching the matter set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience. And Honorable....*William McDonald, one of*....said....*Judges*...., having entered an order that a Writ of Injunction issue out of said Court, according to the prayer of said bill: ....*We*...., therefore in consideration thereof, and of the particular matters in said bill set forth, DO STRICTLY COMMAND YOU, the said....*Henry Sayre*...., and the persons before mentioned and each and every one of you, that you do absolutely desist and refrain from any action that will in any wise change your interest in or title to the premises at....*143 W. Ohio Street*...., concerning which certain acts are charged in said bill as contemplated by you, until this Honorable Court, in Chancery sitting, shall make order to the contrary. Hereof fail not, under penalty of what the law directs.

To the Sheriff of said County, to execute and return in due form of law.

WITNESS,....*JOSEPH E. BIDWILL, JR.*,....
Clerk of said Court, and the Seal thereof, at....*Chicago*...., aforesaid, this....*third*....day of ....*May*....A. D....*1914*....

[SEAL OF COURT]

JOSEPH E. BIDWILL, JR.,....
CLERK.

D. (d) (1) Pleadings—Code—Answer.

137. Answer.

STATE OF....*IOWA*....
County of....*Marion*....} ss.

In the....*Circuit*....Court of....*Marion*....County,
....*September*....Term, A.D....*1914*....

....*William Ward, Plaintiff*.....
v.
....*John Williams, Defendant*....
} Gen. No....*233122*....

....*DEFENDANT'S*....ANSWER:

First defense. ....*Defendant*....at the time of selling said....*automobile*....to....*plaintiff*....had no reason to believe and did not know that said....*automobile was*....not in good condition. Said....*defendant denies*....that....*he*....had attempted to repair....*said machine*....and had ceased....*its*....use for that reason.

Second defense. ....*Defendant admits*....that....*he*....had not used ....*said machine*....for a period of....*one month*....prior to....*its*.... sale, but....*says*....that....*he*....had not used....*said machine*....on account of the fact that....*he*....had been ill and had not been able so to use....*it*....and that this fact was as well known to the ....*plaintiff*.... as to....*him*...., the....*defendant*...., and said....*defendant denies*.... all the other facts alleged in....*plaintiff's*....complaint.

JOHN WILLIAMS....
....*Defendant*....

D. (d) (2) Pleadings—Code—Complaint.

138. Complaint for Deceit in Sale of Personalty.

(For heading, see No. 137.)

COMPLAINT.

....*William Ward, plaintiff, complains*....of....*John Williams, defendant*...., and....*says*....: First,—that....*defendant*...., on the ....*third*....day of....*July*....A. D....*1912*...., at....*Cedar Rapids*...., in the County of....*Marion*...., in the State of....*Iowa*...., intending to deceive the said....*plaintiff*.... and to induce....*him*....to purchase a....*Paddington automobile*...., the property of this....*defendant*...., from....*him*...., the said....*defendant*....made to....*him, the plaintiff*...., certain false representations, to wit: that said....*automobile was*.....in good condition and that.....*it*.....had been used by said ....*defendant*....for....*three months*....previous and during that time had never been broken and had been found satisfactory by said....*defendant*....

Second,—that in truth and in fact said....*automobile was*....not in good condition and said....*defendant*....had been compelled to quit using said....*automobile*....for a period of....*one month*....prior to....*its*.... sale and said....*defendant*....had had said....*automobile*....to a certain repair shop in the County of....*Marion*...., State of....*Iowa*...., on ....*two or three*....different occasions, attempting to get said....*automobile*....in running condition, but....*was*....unable to do so.

Third,—that the....*plaintiff*...., relying on said false representations, ...*was*....thereby induced to purchase and did purchase said....*automobile*....

Fourth,—that....*defendant*....well knew when....*he*....made the representations aforesaid that they were false.

Fifth,—that....*plaintiff*....by....*his*....reliance on said representations suffered damage to the amount of....*One Thousand* (*$1,000.00*)....Dollars.

WILLIAM WARD....
Plaintiff....

139. Complaint for Goods Lost by Common Carrier.

STATE OF....*INDIANA*....
County of ..... *Lake* ..... } ss.

In the....*Superior*....Court of....*Lake*....County,
....*October*....Term, A. D....*1913*....

.....*Henry Williams, Plaintiff*.....
v.
....*Elgin, Joliet & Western Ry. Co.*,
Defendant.... } Gen. No....*67123*....

....*Plaintiff, Henry Williams, complains*....of....*Elgin, Joliet & Western Ry. Co., defendant*...., and....*says*....: That on the....*fifth*....

day of....*November*....A. D....*1912, plaintiff*....delivered to....*defendant, who was*....then a common carrier, the following goods of the ....*plaintiff*...., to wit: ....*100 sacks of potatoes*...., goods which the ...*defendant*...agreed to carry from...*Hammond, Indiana to Indianapolis, Indiana*...., and there to deliver them for the....*plaintiff*....to....*John Ward*.... The....*defendant*....failed so to carry or deliver said goods, and the same were wholly lost to the....*plaintiff*...., to....*his*....damage in the sum of....*One Hundred* (*$100.00*)....Dollars, for which sum, with interest from....*November fifth*....A. D....*1912, he prays*....judgment against the....*defendant*....

PERRY SMITH .....
....*Attorney*....for....*Plaintiff*....

140. Complaint for Libel.

(For heading, see No. 137.)

....*William Ward, plaintiff, complains*....of....*John Williams, defendant*...., and....*says*....: That the....*defendant*...., with malicious intent to injure....*plaintiff*...., on the....*seventh*....day of....*September*....A. D....*1912*....wrote and published, or caused to be written and published, of and concerning....*plaintiff*...., in a certain newspaper called ....*"The Capital"*...., printed and published at....*Des Moines, Iowa*...., and having a large circulation in said County of....*Marion*...., wherein ....*plaintiff*....then and therebefore resided, a certain false and malicious libel and the words and figures following: (Insert copy of libelous matter) to the damage of the....*plaintiff*....in the sum of....*Fifteen Thousand* (*$15,000.00*)....Dollars, for which....*he prays*....judgment against the ....*defendant*....

WILLIAM WARD....

....*HARRY PARKS*....,
....*Attorney*....for....*Plaintiff*....

D. (e) (1) Pleadings—Common Law—Declarations.

141. Caption for Additional Counts in Declaration.

(For heading, see No. 144.)

And now....*comes the plaintiff*....herein, pursuant to an order of Court entered on the....*third*....day of....*May*....A. D....*1914*...., granting leave so to do, and....*files*....this....*his*....additional ....*count*....to....*his*....declaration previously filed herein on the ....*fourth*....day of....*January*....A. D....*1914*....

Plaintiff complains....of (continue with counts relied on. See succeeding numbers according to nature of suit).

JOHN FARRELL.....
....*Attorney*....for....*Plaintiff*....

142. Caption for Amended Declaration.

(For heading, see No. 144.)

And now....*comes the plaintiff*....herein, pursuant to an order of Court entered on the....*third*....day of....*May*....A. D.....*1914*...., granting leave so to do, and....*files*....this....*his*....amended declaration, as follows: (See second paragraph of No. 141).

JOHN FARRELL.....
....*Attorney*....for....*Plaintiff*....

143. Caption for Amendment to Declaration.

(For heading, see No. 144.)

And now....*comes the plaintiff*....herein, pursuant to an order of Court entered on the....*third*....day of....*May*....A. D....*1914*...., granting leave so to do, and....*amends his*....declaration as follows, to wit: In the ....*fourth*....line of the....*second*....page of said declaration, after the word....*back, interline the words*...., to wit: ....*"over and to"*....

JOHN FARRELL.....
....*Attorney*....for....*Plaintiff*....

144. Declaration in Assumpsit on the Common Counts with Affidavit.

STATE OF....*ILLINOIS*....
County of.....*Cook*..... } ss.

In the....*Circuit*....Court of....*Cook*....County.
....*November*....Term, A. D....*1914*....

.....*Oscar Henson, Plaintiff*.....
v.
....*Frank Wagner, Defendant*.... } Gen. No....*63125*....

....*Plaintiff*....in this suit, by....*John Farrell, his attorney, complains*....of....*Frank Wagner, defendant*....in this suit, summoned, etc., of a plea of trespass on the case on promises:

(1) FOR THAT WHEREAS, The said....*defendant*...., heretofore, to wit: on the....*tenth*....day of....*August*....A. D....*1912*...., at ....*Chicago*...., in the County aforesaid, became and....*was*....indebted to the said....*plaintiff*....in the sum of....*Three Hundred* (*$300.00*).... Dollars of lawful money of the United States of America, for divers goods, wares and merchandise, by the said....*plaintiff*....before that time sold and delivered to the said....*defendant*....and at the special instance and request of the said....*defendant*...., and being so indebted to the said ....*plaintiff*...., the said....*defendant*...., in consideration thereof, afterwards, to wit: on the....*same day and year*...., and at the....*place aforesaid*...., undertook, and then and there faithfully promised the said....*plaintiff*...., well and truly to pay unto the said....*plaintiff*....the sum of

money....*last*....mentioned, when the said....*defendant*....should be thereunto afterwards requested.

(2) AND WHEREAS, The said....*defendant*....afterwards, to wit: on the....*sixth*....day of....*September*....A. D....*1914*...., and at the ....*place aforesaid*...., in consideration that the said....*plaintiff*....had before that time, at the special instance and request of the said....*defendant*...., sold and delivered to the said....*defendant*....divers goods, wares and merchandise of the said....*plaintiff*...., the said....*defendant*.... then and there undertook, and faithfully promised the said....*plaintiff*.... that the said....*defendant*....would well and truly pay to the said ....*plaintiff*....so much money as the....*last*....aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof, were reasonably worth when the said....*defendant*....should be thereunto afterwards requested; and the said....*plaintiff avers*....that the said goods, wares and merchandise....*last*....mentioned, at the time of the sale and delivery thereof were reasonably worth the sum of....*Three Hundred* (*$300.00*).... Dollars, of....*like*....lawful money as aforesaid, to wit: at the....*place aforesaid*...., whereof the said....*defendant*....afterwards, on the....*same day and year*...., and at the....*place aforesaid*...., had notice.

(3) AND WHEREAS, The said....*defendant*...., afterwards, to wit: on the....*same day and year*...., and at the....*place aforesaid was*.... indebted to the said....*plaintiff*....in the....*further*....sum of....*Two Hundred* (*$200.00*)....Dollars, of....*like*....lawful money as aforesaid, for money before that time lent and advanced by the said....*plaintiff*.... to the said....*defendant*....and at the request of the said....*defendant*.... And in the sum of —— for other money by the said....*plaintiff*.... before that time paid, laid out and expended for the said....*defendant*.... and at the request of the said....*defendant*.... And in the sum of —— for other money by the said.....*defendant*.....before that time had and received to and for the use of the said....*plaintiff*.... And in the sum of —— for other money before that time and then due and owing the said ....*plaintiff*....for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said ....*defendant*....to said....*plaintiff*.... And in the sum of —— for the price and value of work then done and material for the same provided by the said....*plaintiff*....for the said....*defendant*....and at the special request of the said....*defendant*.... And being so indebted, the said ....*defendant*....in consideration thereof, afterwards, to wit: on the ....*same day and year*...., and at the....*place aforesaid*....undertook, and then and there faithfully promised the said....*plaintiff*....well and truly to pay unto the said....*plaintiff*....the several sums of money in this count mentioned, when the said....*defendant*....should be thereunto afterwards requested.

(4) AND WHEREAS, The said....*defendant*...., afterwards, to wit: on the....*day and year last aforesaid*...., and at the....*place last aforesaid*...., accounted together with the said....*plaintiff*....of and concerning divers other sums of money, before that time due and owing from the said....*defendant*....to the said....*plaintiff*....and then and there

being in arrears and unpaid, and upon such accounting the said....*defendant*....then and there....*was*....found to be in arrears and indebted to the said....*plaintiff*....in the....*further*....sum of....*One Hundred* (*$100.00*)....Dollars of....*like*....lawful money as aforesaid. And being so found in arrears and indebted to the said....*plaintiff*....the said....*defendant*....in consideration thereof afterwards, to wit: on the....*day and year last aforesaid*...., and at the....*place last aforesaid*...., undertook and then and there faithfully promised the said....*plaintiff*....well and truly to pay unto the said....*plaintiff*....said sum of money....*last*.... mentioned, when the said....*defendant*....should be thereunto afterwards requested.

NEVERTHELESS, The said....*defendant*....(although often requested, etc.)....*has*....not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said....*plaintiff*...., but to pay the same or any part thereof to the said....*plaintiff*.... the said...*defendant has*...hitherto altogether refused, and still...*does*... refuse, to the damage of the said.....*plaintiff*.....of.....*One Thousand* (*$1,000.00*).....Dollars, and therefore the said.....*plaintiff brings*..... suit, etc.

JOHN FARRELL.....
....*Plaintiff's Attorney*....

COPY OF ACCOUNT SUED ON.

....*Frank Wagner*....

To....*Oscar Henson*...., Dr.

To goods, wares and merchandise, sold and delivered,	$....*300.00*....
To money lent and advanced,	$....*200.00*....
To money paid, laid out, and expended,	$ ——
To money had and received, to and for the use of said plaintiff,	$ ——
To money due for interest and forbearance,	$ ——
To labor, services and material,	$ ——
To balance due on account stated,	$....*100.00*....

AFFIDAVIT OF AMOUNT DUE.

....*Circuit*....Court of....*Cook*....County.
....*November*....Term, A. D....*1914*....

.....*Oscar Henson*.....
v.
....*Frank Wagner*....

STATE OF....*ILLINOIS*....
County of.....*Cook*..... } ss.

....*Oscar Henson*...., being duly sworn, ...*says*....that the demand of the....*plaintiff*....in the above entitled cause is for....*money due and owing plaintiff for goods sold and delivered, money lent and on account stated*...., and that there is due to the....*plaintiff*....from the....*defend-*

ant...., after allowing to....*him*....all just credits, deductions and set-offs, the sum of....*Six Hundred* (*$600.00*)....Dollars.

OSCAR HENSON....

NOTE. Add acknowledgment before authorized official. See No. 17. Only such counts—(1), (2), (3), (4)—or variations of any count, should be used as there is a possibility of proving, but it is often advantageous to allege the same amount to be due in several different ways, for proof in one way may fail where the amount could be proved in another way. Goods may be delivered at request of defendant, but he may never have promised to pay for them. He could be held, however, on the count for reasonable value, if such count were included. This is the advantage of using both counts.

145. Declaration in Assumpsit for Refusal to Accept Goods.

STATE OF....*ILLINOIS*....
County of....*Kane*.....} ss.

In the....*Circuit*....Court of....*Kane*....County,
....*October*....Term, A. D....*1914*....

....*The American Leather Co.*,
a corporation, Plaintiff....
v.
....*Henry Jones, defendant*....} Gen. No....*29312*....

....*The American Leather Company, plaintiff*...., by....*Jones & Jenkins, its attorneys, complains*....of....*Henry Jones, defendant*...., of a plea of trespass on the case on promises:

FOR THAT WHEREAS, The....*defendant*...., on the....*fifth*....day of....*July*....A. D....*1914*...., in the County aforesaid, bargained for and bought of the....*plaintiff*...., and the....*plaintiff*....then and there sold to the....*defendant*...., at....*his*....request, a large quantity, to wit: ....*One thousand* (*1,000*) *feet of cowhide leather*....at the price of ....*twenty* (*20¢*) *cents per foot*...., to be delivered by the....*plaintiff*.... to the....*defendant*....in....*a month*....from that date at....*Kankakee, Kankakee*....County, ...*Illinois*...., and to be paid for by the....*defendant*....to the....*plaintiff*....on the delivery thereof as aforesaid; and in consideration thereof, and that the.....*plaintiff*.....had promised the ....*defendant*...., at....*his*....request, to deliver the said....*leather*.... to....*him*....in the time and at the place aforesaid, the....*defendant*.... thereupon on the day first aforesaid, in the County aforesaid, promised the ....*plaintiff*....to accept the said....*leather*....from....*it*....and to pay said....*company*....for the same on the delivery thereof as aforesaid: And although the....*plaintiff within a month next*....after making of the said promise by the....*defendant*...., to wit: on the....*first*....day of....*August*....A. D....*1914*...., at....*Kankakee, Illinois*...., aforesaid, ...*was*....ready and willing and tendered and offered to deliver the said ....*leather*....to the....*defendant*...., and then and there requested

....*him*....to accept the same, and to pay therefor as aforesaid, yet the ....*defendant*....did not nor would then or at any time before or afterward, accept the said....*leather*...., or any part thereof, from the ....*plaintiff*...., or pay....*him*....for the same as aforesaid, but refused so to do;

WHEREFORE, and on account of the....*defendant's*....said refusal, ...*plaintiff was*....forced to re-sell the goods at a loss and....*has*.... incurred expense in regard thereto to the extent of....*Three Hundred* (*$300.00*)....Dollars, wherefore....*plaintiff prays*....judgment in the sum of....*Five Hundred* (*$500.00*)....Dollars.

JONES & JENKINS.....,
....*Attorneys*....for....*Plaintiff*....

146. Declaration in Assumpsit on Insurance Policy.

STATE OF....*ILLINOIS*....
County of.....*Cook*..... } ss.

....*Circuit*....Court, ...*Cook*....County,
....*October*....Term, A. D....*1914*....

....*Henry Mark and John Friend, partners, doing business as Mark and Friend, Plaintiffs*....,
v.
....*Mutual Fire Insurance Company of New Jersey, a corporation, Defendant*.... } Gen. No....*63745*....

....*Henry Mark and John Friend, plaintiffs*....in this suit, who, at the time the liability hereinafter mentioned accrued, ...*were and ever since have been partners, under the firm name and style of Mark and Friend*...., by....*Frank Maxwell, attorney, complain*....of....*Mutual Fire Insurance Company of New Jersey*...., the....*defendant*...., which....*is a corporation, organized and existing under the laws of the State of New Jersey*...., and....*which has*....been duly summoned, of a plea of trespass on the case on promises:

FOR THAT WHEREAS, Heretofore, to wit: on the....*fourth*.... day of ....*August*....A. D....*1912*....., at.....*Cook*.....County aforesaid, the ....*plaintiffs were*....interested in and....*were*....the....*owners*....of the property mentioned and described in the policy of insurance hereinafter set forth, which was of the value of.....*Seven Thousand* (*$7,000.00*)..... Dollars, and so continued to be until the destruction of the same by fire, as hereinafter mentioned; and the said....*defendant*....on the same day, in consideration of a premium in money then and there paid to it therefor by the....*plaintiffs*...., made and delivered to the....*plaintiffs*....a policy of insurance, of which the following is a true copy, and thereby undertook and promised as is therein set forth, to wit:

(Insert copy of policy here.)

And the....*plaintiffs aver*....that afterwards, and before the expiration of the time limited in said policy, to wit, on the.....*fifth*.....day of ....*July*....A. D....*1913*...., the said property was accidentally, and by

misfortune, totally consumed by fire, of which loss the said....*plaintiffs*.... forthwith gave notice to the....*defendant*....in writing, and as soon as possible thereafter, to wit: on the....*same day*...., delivered to the....*defendant*....a particular account thereof under....*their*....hand and verified by ....*their*....oath, and did at the same time declare on oath what other insurance had been made on the same property, giving a copy of the written portion of each of said policies, and stating the whole value of the property insured, and the manner in which the....*building*....in which the loss occurred....*was*....occupied at the time of the loss, and who were the occupants, and how the fire originated, and did also at the time deliver to the ....*defendant*....a certificate, under the hand and seal of a notary public most contiguous to the place of said fire, not concerned in said loss nor related to the....*plaintiffs*...., that he, said notary, was acquainted with the character and circumstances of the....*plaintiffs*...., and verily believed that....*they*....really, and by misfortune, had sustained by said fire loss and damage to the amount of....*Seven Thousand* (*$7,000.00*)....Dollars, and did duly perform all the acts and things required of....*them*....by said policy, and the....*defendant*....then and there received and accepted said proofs as satisfactory, and waived all objection thereto.

YET the said....*defendant*...., although often requested, and though more than....*sixty days*....have elapsed since the delivery of said proofs of loss, ...*has*....not paid the said money or any part thereof to the ....*plaintiffs*...., but to pay the same has neglected and refused, to the damage of the....*plaintiffs*....in the sum of....*Ten Thousand* (*$10,000.00*)....Dollars, and therefore....*they bring*....suit, etc.

FRANK MAXWELL.....
....*Plaintiffs' Attorney*....

147. Declaration in Assumpsit for Breach of Promise to Marry.

STATE OF....*ILLINOIS*....
County of.....*Will*..... } ss.

In the....*Circuit*....Court of....*Will*....County,
....*October*....Term, A. D....*1914*....

.....*Helen Warren, Plaintiff*.....
v.
....*William Warner, Defendant*.... } Gen. No....*161257*....

....*Helen Warren*...., plaintiff, by....*Tucker Fraser, her attorney*...., complains of....*William Warner*...., defendant, of a plea of trespass on the case on promises:

FOR THAT WHEREAS, The defendant on the....*first*....day of ....*December*....A. D....*1912*...., in consideration that the plaintiff, being then unmarried, had then and there promised the defendant, at....*his*....request, to marry....*him*...., when....*she*...., the plaintiff, should be thereto requested, the defendant promised the plaintiff to marry ....*her*...., when....*he*....should be thereto requested: And the plain-

tiff avers that....*she*...., confiding in the said promises of the defendant, has always from thence hitherto remained and still is unmarried, and has been for all the time aforesaid, and still is ready and willing to marry....*him*.... Yet although the plaintiff, after the making of the said promises by the defendant, to wit, on the day aforesaid, then and there requested the defendant to marry....*her*...., the defendant did not nor would then, or at any time before or afterward, marry the plaintiff, but refused so to do; to the damage of the plaintiff in the sum of....*Ten Thousand* (*$10,000.00*)....Dollars, wherefore....*she*....brings this suit.

TUCKER FRAZER.....
....*Attorney*....for the Plaintiff

148. Declaration in Assumpsit on Promissory Note with Confession (Narr and Cognovit).

(For heading, see No. 144.)

....*Oscar Henson, plaintiff*....in this suit, by....*Williams and May, his attorneys, complains*....of....*Frank Wagner, defendant*....in this suit, of a plea of trespass on the case on promises:

FOR THAT WHEREAS, The said....*defendant*...., heretofore, to wit: on the....*fifth*....day of....*August*....A. D....*1912*...., at....*Chicago*...., in the County aforesaid, made....*a*....certain....*instrument*.... in writing, commonly called....*a promissory note*...., bearing date the day and year last aforesaid, and then and there delivered the said....*note*.... to the said....*plaintiff*...., in and by which said....*note*....the said ....*defendant*....by the name, style, and description of....*Frank Wagner*....promised to pay to the order of said....*plaintiff*...., the....*sum*.... of....*One Thousand* (*$1,000.00*)....Dollars, with interest at the rate of ....*five*....per cent per annum until maturity and at the rate of...*seven*... per cent per annum after maturity, for value received. By reason whereof, and by force of the statute in such case made and provided, the said ....*defendant*....became liable to pay to the said....*plaintiff*....the said ....*sum*....of money in the said....*note*....specified, according to the tenor and effect of the said....*note*....; and, being so liable, the said....*defendant*...., in consideration thereof, afterwards, to wit: on the....*same day and year last aforesaid*...., and at the....*place last aforesaid*...., undertook, and then and there faithfully promised the said....*plaintiff*....well and truly to pay unto the said....*plaintiff*....the said....*sum*....of money in the said....*note*....specified, according to the tenor and effect of said ....*note*....

YET the said....*defendant*...., although often requested, etc., ...*has*... not yet paid the said....*sum*....of money, or any part thereof, to the said ....*plaintiff*...., but so to do....*has*....hitherto wholly refused, and still ....*does*....refuse, to the damage of the said....*plaintiff*....in the sum of ....*Two Thousand* (*$2,000.00*)....Dollars, and therefore....*he*....brings suit, etc.

WILLIAMS AND MAY....
....*Plaintiff's Attorneys*....

....*Superior*....Court of....*Cook*....County,
....*October*....Term, A. D....*1914*....

.....*Oscar Henson*.....
v.
....*Frank Wagner*....
} COGNOVIT.

AND THE SAID....*Frank Wagner, defendant*....in the above entitled suit, by....*Johnson and Ward, his attorneys, comes*....and....*defends*.... the wrong and injury, when, etc., and....*waives*....service of process, and ....*says*....that....*he*....can not deny the action of the said....*plaintiff*...., nor that....*he*...., the said....*defendant*...., did undertake and promise, in manner and form as the said....*plaintiff has*....above complained against....*him*....nor that the said....*plaintiff has*....sustained damages on occasion of the non-performance of the several promises and undertakings in the said declaration mentioned, including the sum of ....*Fifty* (*$50.00*)....Dollars, as reasonable attorney's fees for entering up this judgment, over and above other costs and charges by....*him*.... about this suit in this behalf expended to the amount of....*Twenty* (*$20.00*)....Dollars and....*Fifty*....Cents; and the said....*defendant*.... further....*agrees*....that no writ of error or appeal shall be prosecuted on the judgment entered by virtue hereof, nor any bill in equity filed to interfere, in any manner, with the operation of said judgment, and that....*he*.... hereby....*releases*....all errors that may intervene in entering up the same, or issuing the execution thereon, and....*consents*....to immediate execution upon such judgment.

JOHNSON AND WARD.....
....*Defendant's Attorneys*....

149. Declaration in Case for Wrongfully Causing Death.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....
} ss.

In the....*Circuit*....Court of....*Cook*....County,
....*May*....Term, A. D....*1914*....

....*John F. Devine, administrator of the estate of Gilbert Havens, deceased, Plaintiff*....
v.
....*Milwaukee Northern Railroad Company, a corporation, Defendant*....
} Gen. No....*32311*....

....*John F. Devine, administrator*....of the estate of....*Gilbert Havens*...., deceased, by....*Albert Jones, his attorney, complains*....of the ....*Milwaukee Northern Railroad Company, a corporation, defendant*...., of a plea of trespass on the case:

FOR THAT WHEREAS, The....*defendant*...., in the lifetime of the said....*Gilbert Havens*...., to wit: on the....*fourth*....day of....*October*....A. D....*1912, was*....possessed of and using and operating a certain railroad extending through a part of the County aforesaid, and

....*was*....also then and there possessed of a certain locomotive engine, with a certain train of cars thereto attached, which were under the care and management of divers then servants of the....*defendant*...., who were then and there driving the same upon and along the said railroad, near and toward a certain crossing of the said railroad and a certain public highway leading from....*Evanston*....to....*Wilmette, Illinois*...., and while the said....*Gilbert Havens*...., with all due care and diligence was then and there riding across the said railroad at the said crossing, upon the said public highway there, in a certain wagon drawn by two horses, the....*defendant*....then and there, by....*its*....said servants, so carelessly and improperly drove and managed the said locomotive and train, that by and through the negligence and improper conduct of the....*defendant*...., by ....*its*....servants, in that behalf, said locomotive engine and train then and there ran and struck with great force and violence upon and against the said wagon and thereby the said....*Gilbert Havens*....was then and there thrown with great force and violence from and out of said wagon to and upon the ground there and was thereby then and there bruised, maimed, and suffered injuries from which....*he*....later died.

And the....*plaintiff avers*....that the said....*Gilbert Havens*....left him surviving one....*Jane Havens, his widow*...., and one....*Louis Havens, his son*...., and one....*Agnes Havens, his daughter*...., as next of kin, who are still living; and that by reason of the death of the said ....*Gilbert Havens*...., as aforesaid, the said....*Jane Havens*....has been and is deprived of her means of support and the said....*Louis Havens has been*....and....*is*....deprived of....*his*....means of support and education, and the said....*Agnes Havens has been*....and....*is*....deprived of....*her*....means of support and education.

To the damage of the....*plaintiff, as administrator*....aforesaid, in the sum of....*Ten Thousand* (*$10,000.00*)....Dollars, and therefore....*he brings his*....suit. And the....*plaintiff brings*....into court here the letters of administration to....*him*....granted by the....*Probate*.... Court of....*Cook*....County, as evidence to this court of the grant of administration of the said intestate to the....*plaintiff*....

ALBERT JONES.....

....*Attorney*....for....*Plaintiff*....

NOTE. This declaration is intended only as an outline. Any declaration in an action of case must conform to the particular facts of the case at hand. Particularly in master and servant cases where the rules of law are complex, it is difficult to draw a declaration which states a cause of action and which will at the same time so conform to the facts that a motion for variance will not be sustained on the trial of the case. Several counts are usually resorted to in close cases so that at least one may weather both obstacles. Where ordinances are pleaded, they must be set forth verbatim, but this is not true of statutes. In connection with these Forms, reference should be made to the various articles on Pleading in Volume X of "Modern American Law."

150. Declaration in Case for Personal Injuries.

STATE OF....*ILLINOIS*....}
County of ..... *Cook* .....} ss.

In the....*Circuit*....Court of....*Cook*....County,
....*May*....Term, A. D....*1914*....

....*Frank Phelan, Plaintiff*....
v.
....*Chicago, Minneapolis & St. Paul Railroad Company, a corporation, Defendant*....
} Gen. No....*67314*....

....*Frank Phelan*...., plaintiff, by....*Tucker Williams, his attorney*...., complains of the....*Chicago, Minneapolis & St. Paul Railroad Company*...., defendant, of a plea of trespass on the case:

FOR THAT WHEREAS, The defendant, on the....*third*....day of ....*August*....A. D....*1912*...., was possessed of and using and operating a certain railroad extending from....*Minneapolis*....to....*Chicago*...., and in the County aforesaid, with certain trains of cars running thereon for the conveyance of goods and passengers, for reward; and the plaintiff at....*Chicago, Illinois*...., aforesaid, then became a passenger in a certain train of the defendant, on the said railroad, to be carried, and was thereupon accordingly then carried, in the said train, from ....*Chicago*....to....*Minneapolis*...., for certain reward to the defendant in that behalf.

AND THEREUPON it became and was the duty of the defendant, upon the arrival of said train at....*Minneapolis*....aforesaid, to give the plaintiff an opportunity of safely alighting therefrom and then and there to stop the said train for a reasonable time to enable the plaintiff so to alight therefrom safely as aforesaid; yet the defendant did not regard its duty, or use due care in that behalf, but on the contrary thereto upon the arrival of the said train at....*Minneapolis*....aforesaid on the date aforesaid, and while the plaintiff with all due care and diligence was then and there about to alight therefrom, the defendant carelessly and negligently caused the said train to be suddenly and violently started and moved, and thereby the plaintiff was then and there thrown with great force and violence from and off the said train to and upon the ground there; by means whereof, then and there one of the arms of said plaintiff was broken and one of....*his*.... ankles was dislocated and....*he*....was otherwise greatly bruised, seriously and permanently hurt and wounded; and thereby the plaintiff was obliged to and did then and there lay out divers large sums of money, amounting to ....*Five Hundred* (*$500.00*)....Dollars, in and about endeavoring to be cured of the said injuries so received as aforesaid; and also by means of the premises the plaintiff then and there became and was sick, sore, lame and disordered, and so remained for a long time, to wit: from thence hitherto up to and including this and will permanently so remain, and the plaintiff suffered great pain, and was and still is hindered and prevented from transacting and attending to....*his*....business and affairs, and lost and still is deprived of divers great gains and profits which....*he*....might and other-

wise would have made and acquired: To the damage of the plaintiff in the sum of...*Fifteen Thousand* (*$15,000.00*)...Dollars, and therefore...*he*... brings....*his*....suit.

TUCKER WILLIAMS.....
....*Attorney*....for....*Plaintiff*....

151. Declaration in Case for Damage to Property by Carrier.

(For heading, see No. 150.)

....*Frank Phelan, plaintiff*...., by....*H. P. Wales, his attorney, complains*....of the....*Chicago, Minneapolis and St. Paul Railroad, defendant*...., of a plea of trespass on the case:

FOR THAT WHEREAS, The....*defendant*...., on the....*fourth*....day of....*August*....A. D....*1912, was*....possessed of and using and operating....*a certain railroad*....and....*was a common carrier*....of goods and chattels thereon for hire, to wit: from....*Chicago*....to....*Toledo, Ohio*....: And the....*plaintiff*....on the date aforesaid, at....*Chicago*.... aforesaid, caused to be delivered to the....*defendant*...., and the....*defendant*....then and there received of the....*plaintiff seventeen* (*17*) *rolls of cat skins*...., of the value of....*Five Hundred* (*$500.00*)....Dollars, to be safely and securely carried by the....*defendant*....between the points aforesaid, and at the last named place to be safely and securely delivered to....*one Harry Ward*....for certain reward to the....*defendant*....in that behalf;

YET the....*defendant*....did not safely and securely carry the said goods aforesaid between the points aforesaid, and at the last named place safely and securely deliver the same to....*Harry Ward*....; but on the contrary thereto, by the negligence of the....*defendant*....and....*its*.... servants in that behalf, the said goods aforesaid afterwards, to wit: on the ....*sixth*....day of....*August*....A. D....*1912*...., became and were wholly lost to the....*plaintiff*....: To the damage of the....*plaintiff*.... of....*One Thousand* (*$1,000.00*)....Dollars, and therefore....*he brings his*....suit.

H. P. WALES.....
....*Attorney*....for....*Plaintiff*....

152. Declaration in Case for Slander.

(For heading, see No. 147.)

....*Helen Warren, plaintiff*...., by....*Henry Farrell, her attorney, complains*....of....*William Warner, defendant*...., of a plea of trespass on the case:

FOR THAT WHEREAS, ...*plaintiff*...., before and at the time of the committing by the....*defendant*....of the several grievances hereinafter mentioned, ...*was*....and always....*has*....been virtuous and chaste, and....*was a person*....of good name and reputation, and deservedly enjoyed the esteem and good opinion of....*her*....neighbors and other worthy citizens of this State:

YET the....*defendant*...., well knowing the premises, but contriving and maliciously intending to injure the....*plaintiff*....in....*her*....good name and reputation, and to bring....*her*....into public scandal and disgrace, and to cause it to be spoken and believed by divers persons that....*she was unchaste*....on account of a certain discourse which the....*defendant*.... on or about the....*fifth*....day of....*July*....A. D....*1912*....then and there had in the presence and hearing of divers persons, of and concerning the....*plaintiff*...., falsely and maliciously, in the presence and hearing of the said persons, spoke and published of and concerning the....*plaintiff*....the false, scandalous, malicious and defamatory words following, that is to say, ...*"Helen Warren is too intimate with a couple of men in town"*...., meaning thereby then and there to charge that the....*plaintiff*....had been and....*was*....guilty of....*fornication*....

By means of the committing of which said several grievances by the ....*defendant*...., the....*plaintiff has*....been and....*is*....greatly injured in....*her*....said good name and reputation, and brought into public scandal and disgrace, and....*has*....been and....*is*....shunned and avoided by divers persons, and....*has*....been and....*is*....otherwise injured. To the damage of the.....*plaintiff*.....in the sum of.....*Five Thousand* (*$5,000.00*)....Dollars, and therefore....*she brings her*....suit.

HENRY FARRELL.....

....*Attorney*....for....*Plaintiff*....

153. Declaration in Covenant for Breach of Warranty.

(For heading, see No. 144.)

....*Oscar Henson, plaintiff*...., by....*Tucker Ford, his attorney, complains*....of....*Frank Wagner, defendant*...., of a breach of covenant:

FOR THAT WHEREAS, The....*defendant*...., on the....*third*.... day of....*August*....A. D....*1912*...., in....*Chicago, Illinois*...., by ....*his*....deed bearing date of that day, and now to the Court here shown, for the consideration therein mentioned, did grant, bargain and sell to the ....*plaintiff, his*....heirs and assigns, a certain parcel of land in the said deed particularly described, as Lot....*Six* (*6*)....in Block....*Three* (*3*), *Howe's Subdivision*....to the....*original Village*....of....*Riverside, Illinois*...., to have and to hold the same to the....*plaintiff, his*....heirs and assigns, forever; and the....*defendant*....did by this said deed covenant with the....*plaintiff, his*....heirs and assigns, among other things, that at the time of the ensealing and delivery of the said deed the said parcel of land was free and clear from all former or other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind or nature soever.

YET, the....*plaintiff avers*....that the said above mentioned parcel of land was not, at the time of the ensealing and delivery of the said deed, free and clear from all former or other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind or nature soever, but on the contrary thereto, the....*defendant*....before that time, to wit,

on the....*tenth*....day of....*March*....A. D....*1909*...., by....*his*.... deed of that date had mortgaged the said parcel of land to....*one George Hard*....to secure the payment of....*One Thousand* (*$1,000.00*)....Dollars with interest thereon, to the said....*George Hard*....by the....*tenth*.... day of....*March*....A. D....*1913*...., which said sum of money, with interest thereon from the....*tenth*....day of....*March*....A. D....*1912*...., is still unpaid, and the said parcel of land is still chargeable with the payment thereof. And so the....*plaintiff says*....that the....*defendant has*....not kept....*his*....covenant aforesaid, but....*has*....broken the same to the damage of the....*plaintiff*....in the sum of....*Two Thousand* (*$2,000.00*)....Dollars, and therefore....*he brings his*....suit.

TUCKER FORD.....

....*Attorney*....for....*Plaintiff*....

154. Declaration in Action of Debt.

(For heading, see No. 144.)

....*Oscar Henson, plaintiff*....in this suit, by....*Henry Ward, his attorney, complains*....of....*Frank Wagner, defendant*....in a plea that ....*he render*....to said....*plaintiff*....the sum of....*Four Hundred* (*$400.00*)....Dollars, which....*he owes*....to and unjustly....*detains*.... from....*plaintiff*....

FOR THAT WHEREAS, The said....*defendant*...., to wit, on the ....*first*....day of....*May*....A. D....*1912*...., to wit, at....*Charleston*....in the County of....*Bond*....and State aforesaid, was indebted to the said....*plaintiff*....in the sum of....*Four Hundred* (*$400.00*).... Dollars, for the use and occupation of a certain parcel of land, messuage and premises, with the tenements and appurtenances of the said....*plaintiff*...., by the said....*defendant*...., and at....*his*....special instance and request, and by the sufferance and permission of the said....*plaintiff*.... for a long time before then elapsed, held, used, occupied, possessed and enjoyed, which said last mentioned sum of money was to be paid to the said ....*plaintiff*....by the said....*defendant*....on request.

YET the said....*defendant*...., although often requested so to do, ...*hath*....not paid the said sum of money above demanded, so due to the said....*plaintiff*....as aforesaid, or any part thereof, but so to do ....*hath*....wholly refused and still....*doth*....refuse, to the damage of the said....*plaintiff*....of....*Five Hundred* (*$500.00*)....Dollars; and therefore....*he brings*....suit, etc.

HENRY WARD.....

....*Attorney*....for....*Plaintiff*....

155. Declaration in Ejectment.

(For heading, see No. 144.)

....*Oscar Henson, plaintiff*...., by....*Tucker Allen, his attorney, complains*....of....*Frank Wagner, defendant*...., of a plea of ejectment:

FOR THAT The....*plaintiff*....on the....*third*....day of....*December*....A. D....*1913, was*....possessed of a certain parcel of land, with the

appurtenances thereto belonging, lying in the County of....*Cook*....aforesaid, to wit, Lot....*Three* (*3*)...., Block....*Six* (*6*), *Parker's Subdivision*....to the....*City*....of....*Evanston, Illinois*...., tenements which the....*defendant claims*....in fee:

And the....*plaintiff*....being so thereof possessed, the....*defendant*.... afterwards, to wit, on the.....*fourth*.....day of.....*December*.....A. D. ....*1913*...., entered into the said tenements, and now unlawfully....*withholds*....from the....*plaintiff*....the possession thereof; to the damage of the....*plaintiff*....in the sum of....*Two Thousand* (*$2,000.00*).... Dollars, and therefore....*he brings his*....suit.

TUCKER ALLEN.....
....*Attorney*....for....*Plaintiff*....

156. Complaint in Forcible Detainer.

(For heading see No. 144.)

....*Oscar Henson, plaintiff*....by....*Henry Ward, his attorney, complains*....of....*Frank Wagner, defendant*....of a plea of forcible entry and detainer:

FOR THAT WHEREAS, Heretofore, to wit, on the....*first*....day of ....*September*...., A. D....*1912*...., the....*defendant*....entered upon the following described premises of the....*plaintiff*...., to wit, Lot....*Five* (*5*)....Block....*Six* (*6*) *Parker's Addition*....to the....*City*....of ....*Evanston*...., in the County of....*Cook*....and State of....*Illinois*...., under and by virtue of a certain lease executed by the....*plaintiff*....to the....*defendant*...., bearing date the....*first*....day of....*September*...., A. D....*1912*...., and expiring the....*thirty-first*....day of ....*August*...., A. D....*1914*....

And the....*defendant's*....right to the possession of the said above described premises by virtue of the lease aforesaid has expired, and the ....*plaintiff is*....entitled to the possession of the said premises.

And the....*plaintiff avers*....that the....*defendant, Frank Wagner*.... unlawfully....*withholds*....possession of the said premises, although demand therefor has been made by the....*plaintiff*....as provided by law.

Wherefore the....*plaintiff says*....that....*he is*....injured and....*he has*....sustained damage in the sum of....*Fifty*....Dollars and therefore ....*he brings his*....suit.

HENRY WARD.....
....*Plaintiff's Attorney*....

NOTE. The attached form is an example of the pleadings used in the Municipal Court of Chicago. Common law forms have there been discarded and each pleading must be a plain statement of fact without any conclusions.

(For heading, see No. 144.)

....*Oscar Henson, plaintiff, complains*....to the....*Circuit*....Court in the County and State aforesaid, that....*he*...., the said....*Oscar Henson, is*....entitled to the possession of the following described premises in said ....*City*...., to-wit: ....*The Flat on the third floor at No. 243 W. Polk*

Street...., and that....*Frank Wagner, defendant*...., unlawfully....*withholds*....the possession thereof from the said....*Oscar Henson*.... Wherefore....*he prays*....a summons, in pursuance of the statute in such case made and provided.

Dated....*October third*....A. D....*1914*....

OSCAR HENSON....

157. Garnishment Demand.

....*May tenth*....A. D....*1914*....

TO Mr....*William Ward*...., wage earner, and....*Chicago Great Eastern Railroad Company*...., employer:

....*I*....hereby demand of you the sum of....*Twenty* (*$20.00*).... Dollars, out of moneys due, or which shall become due, to....*William Ward*....as wages, in excess of....*his*....legal exemptions as provided by statute of the State of....*Illinois*....in regard to garnishments.

Mr....*Henry Smith*....is hereby authorized to receive and receipt for the same for *JAMES WARREN*....

Personally served the above notice and demand on the above named debtor....*William Ward*....by delivering to....*him*....a true copy thereof on the....*tenth*....day of....*May*....A. D....*1914*....at....*three*.... o'clock....*P*....M., and on....*Chicago Great Eastern Railroad Company*...., employer, by delivering to....*Frank Strong, its attorney*...., a true copy thereof on the....*tenth*....day of....*May*....A. D....*1914*.... at....*four*....o'clock....*P*....M., both copies having the time of service endorsed thereon, more than twenty-four hours before the time of beginning suit.

STATE OF....*ILLINOIS*....,
County of.....*Cook*.....} ss.

....*James Warren*.... being duly sworn, on his oath says that he served the within notice and demand in manner and form as above set forth.

JAMES WARREN....

NOTE. Add acknowledgment before authorized official. See No. 17.

158. Declaration in Replevin.

(For heading, see No. 144.)

....*Frank Wagner was*....summoned to answer....*Oscar Henson*....of a plea wherefore.....*he*.....took the goods and chattels of the said ....*plaintiff*....and....*has*....wrongfully detained the same.

(1) And thereupon, the said....*plaintiff*...., by....*Edward Holt, his attorney, complains*....: For that the said....*defendant*...., on the ....*third*....day of....*May*....A. D....*1914*...., at....*Waukegan*...., in the County aforesaid, wrongfully took the goods and chattels, to wit: ....*five tables, one soda fountain, and two stands*....of the said....*plaintiff*...., of the value of....*One Hundred Ten* (*$110.00*)....Dollars, and ....*has*....wrongfully detained the same.

(2) And also, wherefore, the said....*defendant has*....wrongfully

detained the goods and chattels of the said....*plaintiff*....: For that the said....*defendant*...., on the....*third*....day of....*May*....A. D. ....*1914*...., in the County aforesaid, wrongfully took certain of the goods and chattels of the said....*plaintiff*...., to wit: ....*one horse and buggy*.... of the value of....*One Hundred* (*$100.00*)....Dollars, and....*has*.... wrongfully detained same.

(3) And also, for that whereas, the said....*plaintiff*...., on the day last aforesaid, in the County aforesaid, ...*was*....lawfully possessed, as of ....*his*....own property, of certain other goods and chattels, to wit: ....*five cows*....of the value of....*Three Hundred* (*$300.00*)....Dollars; and being so possessed thereof, the said....*plaintiff*....afterwards, to wit: on the same day, there casually lost the last-mentioned goods and chattels out of....*his*....possession, and the same afterwards, to wit: on the same day, there came to the possession of the said....*defendant*...., by finding; yet the said....*defendant*...., well knowing the last-mentioned goods and chattels to be the property of the said....*plaintiff*, *has*....not as yet delivered the same, or any or either of them, or any part thereof, to the said.....*plaintiff*....., though often thereto requested, but.....*has*..... hitherto refused so to do, and afterwards, to wit: on the same day, there converted and disposed of the last-mentioned goods and chattels to...*his*... own use.

Wherefore, the said....*plaintiff says*....that....*he was*....injured and....*has*....sustained damage to the amount of....*Two Hundred* (*$200.00*)....Dollars, and therefore....*he brings his*....suit, etc.

EDWARD HOLT.....
....*Plaintiff's Attorney*....

Only such counts—(1), (2), (3)—should be used as there is a possibility of proving.

159. Declaration in Trespass for Personal Assault with Special Damages.

(For heading, see No. 144.)

....*Oscar Henson*...., by....*Henry Jones, his attorney*...., complains of....*Frank Wagner, defendant*...., of a plea of trespass: for that the ....*defendant*....on the....*fourth*....day of....*July*....A. D....*1913*...., with force and arms, etc., in the County aforesaid, assaulted the plaintiff and then and there violently seized and laid hold of plaintiff, and then and there, with a certain stick and with....*his*....fists, gave and struck the plaintiff a great many violent blows on divers parts of....*his*....body; and also then and there, with great force and violence, tore and damaged the clothes of plaintiff, to wit: ....*one coat, one pair of trousers, one shirt and one hat*...., all of the value of....*Sixty* (*$60.00*)....Dollars;

By means of which several premises, the plaintiff was then and there greatly hurt, bruised and wounded and became and was sick, sore, lame and disordered, and so remained for a long space of time, and will so remain; and also thereby the plaintiff was obliged to and did necessarily lay out

divers sums of money amounting to....*Two Hundred* (*$200.00*)....Dollars, in and about endeavoring to be healed of the said bruises, wounds, sickness, soreness, lameness, and disorder so by the....*defendant*....occasioned as aforesaid.

And other wrongs the....*defendant*....to the plaintiff then and there did, to the great damage of the plaintiff and against the peace of the people of this State. Wherefore the plaintiff says that....*he*....is injured and has sustained damage to the amount of....*One Thousand* (*$1,000.00*).... Dollars and therefore....*he*....brings....*his*....suit.

HENRY JONES.....

....*Attorney*....for....*Plaintiff*....

160. Declaration for Trespass to Land Vi et Armis.

(For heading, see No. 144.)

....*Oscar Henson, plaintiff*...., by....*Frank Taylor, his attorney, complains*....of....*Frank Wagner, defendant*...., of a plea of trespass: for that the....*defendant*....on the....*fourth*....day of....*December*.... A. D....*1913*...., and on divers other days and times between that day and the commencement of this suit, with force and arms, in the County aforesaid, ...*felled, cut and destroyed trees and saplings*...., to wit, ...*17 oaks, 6 ash trees and other trees and saplings*....of the....*plaintiff*...., of the value of....*Five Hundred* (*$500.00*)....Dollars, then ....*growing and being*....in and upon certain lands of the....*plaintiff*...., to wit: ....*South Half* (*S. ½*)....of Section....*Three*...., Township ....*Five, North*....Range....*Five, East*....of the....*Third*....Principal Meridian; and took and carried away the said....*trees and saplings*...., and converted and disposed of the same, to....*his*....own use, and other wrongs to the....*plaintiff*....then and there did, against the peace of the people of this State and to the damage of the....*plaintiff*....of....*One Thousand* (*$1,000.00*)....Dollars, and therefore....*he brings his*....suit.

FRANK TAYLOR.....

....*Attorney*....for....*Plaintiff*....

161. Declaration for Trespass Against Personalty.

(For heading, see No. 144.)

....*Oscar Henson, plaintiff*...., by....*John Hart, his attorney, complains*....of....*Frank Wagner, defendant*...., of a plea of trespass: for that the....*defendant*....on the....*tenth*....day of....*December*....A. D. ....*1913*...., at....*Chicago*...., in the County and State aforesaid, ...*shot off and discharged a certain gun, then and there loaded with gunpowder, and shot at a certain dog*....of the....*plaintiff*...., of great value, to wit, of the value of....*Forty* (*$40.00*)....Dollars, and thereby, therewith then and there....*so greatly hurt and wounded the said dog*...., that by reason thereof the said....*dog*...., being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, ...*died*....; and other wrongs

to the....*plaintiff*....then and there did, against the peace of the people of this State and to the damage of the....*plaintiff*....of....*One Hundred* (*$100.00*)....Dollars, and therefore....*he brings his*....suit.

JOHN HART.....

....*Attorney*....for....*Plaintiff*....

162. Declaration in Trover.

(For heading, see No. 144.)

....*Oscar Henson, plaintiff*....in this suit, by....*Frank Mitchell, his attorney, complains*....of....*Frank Wagner, defendant*....in this suit, summoned, etc., of a plea of trespass, on the case:

FOR THAT WHEREAS, The said....*plaintiff*....heretofore, to wit: on the....*fourth*....day of....*May*....A. D....*1914*...., to wit: at ....*Wilmette*...., in said County, ...*was*....lawfully possessed as of ....*his*....own property of certain goods and chattels, to wit: ....*one fox terrier*....of great value, to wit: of the value of....*Forty* (*$40.00*).... Dollars, lawful money of the United States of America. And being so possessed thereof....*he*...., the said....*plaintiff*...., afterwards, to wit: on the day and year first above mentioned, at the County aforesaid, casually lost the said goods and chattels out of....*his*....possession; and the same afterwards, to wit: on the same day and year last aforesaid, at the County aforesaid, came into the possession of the said....*defendant*....by finding. Yet the said....*defendant*...., well knowing the said goods and chattels to be the property of the said....*plaintiff*....and of right to belong and appertain to....*him*....but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said....*plaintiff*....in this behalf, ...*hath*....not as yet delivered the said goods and chattels to the said ....*plaintiff*...., although often requested so to do, and....*hath*....hitherto wholly refused so to do; and afterwards, to wit: on the same day and year last aforesaid, at the County aforesaid, converted and disposed of the said goods and chattels to....*his*....own use.

WHEREFORE, The said....*plaintiff says*....that....*he was*....injured and.....*has*.....sustained damage to the amount of.....*One Hundred* (*$100.00*)....Dollars, and therefore....*he brings his*....suit, etc.

FRANK MITCHELL.....

....*Plaintiff's Attorney*....

D. (e) (2) Pleadings—Common Law—Demurrers.

163. General Demurrer to Declaration.

(For heading, see No. 144.)

AND THE SAID DEFENDANT, ...*Frank Wagner*...., by....*James, Northrup and Ames, his attorneys, comes*....and....*defends*....the wrong and injury, when, etc., and....*says*....that....*all*....the counts of....*plaintiff's*.... said declaration and the matters and things therein contained, in manner and form as the same are above set forth, are not sufficient in law for

....*him*...., the said....*plaintiff*...., to maintain.....*his*.....aforesaid action against....*said defendant*...., and.....*he*...., the said....*defendant, is*....not bound by law to answer the same, and this....*he is*.... ready to verify, wherefore for want of a sufficient declaration or count thereof in this behalf, the said....*defendant prays*....judgment, etc.

JAMES, NORTHRUP AND AMES....
....*Defendant's Attorneys*....

STATE OF....*ILLINOIS*....,
County of.....*Cook*.....} ss.

....*Edward Northrup*...., being first duly sworn, deposes and says that ....*he*....is....*a member of the firm of James, Northrup and Ames, attorneys*....for....*defendant*....herein, and that the above demurrer is in ....*his*....opinion[1] (well founded in point of law) and that said demurrer is[2] (not interposed for the purpose of delay).

EDWARD NORTHRUP....

NOTE. Add acknowledgment by authorized official. See No. 17. Some statutes require (1) merely to be certified to and (2) sworn to. Where the statutes are so worded, it is customary to draw separate statements accordingly.

164. Special Demurrer.

(For heading, see No. 144.)

The....*defendant, Frank Wagner*...., by....*Ray Simpson, his attorney, says*....that the said declaration is not sufficient in law,

And the....*defendant shows*....to the court the following special ground of demurrer to said declaration:

That the....*plaintiff has*....alleged that the....*defendant*....promised to pay the....*plaintiff*....a specific sum, to wit: ....*Two Hundred ($200.00)*....Dollars for the said....*horse*....; and that also....*defendant*....promised to pay....*plaintiff*....for the same so much as....*he*.... therefor reasonably deserved to have; and a breach of each of such supposed promises is laid in the said first count.

RAY SIMPSON.....
....*Attorney*....for....*Defendant*....

NOTE. Add affidavit as in No. 163.

D. (e) (3) Pleadings—Common Law—Judgments.

165. Certificate of Entry of Judgment.

(For heading, see No. 144.)

I, ...*James W. Stillwell*...., Clerk of the....*Circuit*....Court of the County and State aforesaid, and the keeper of the records and files thereof, do hereby certify the above and foregoing to be a true, perfect and complete transcript of the judgment in a certain cause lately pending in said court, wherein....*Oscar Henson is plaintiff*....and....*Frank Wagner is defendant*....

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, at Chicago, aforesaid, this....*third*....day of....*June*.... A. D....*1914*....

[SEAL OF COURT] *JAMES W. STILLWELL*....
CLERK.

166. Satisfaction of Judgment.

(For heading, see No. 144.)

Judgment was rendered for the....*plaintiff*....and against the....*defendant, Frank Wagner*...., in the above entitled cause, on the....*third*.... day of.....*March*.....A. D.....*1914*.....for the sum of.....*Seventy* (*$70.00*)....Dollars and....*Fifty*....Cents, and for costs of suit amounting to....*Eight* (*$8.00*)....Dollars and....*No*.....Cents, and.....*Oscar Henson*...., being judgment creditor in the above entitled cause, ...*does*... hereby acknowledge full satisfaction of the above judgment this...*fourth*... day of....*August*....A. D....*1914*...., the said judgment and costs having been paid, and the Clerk of the....*Municipal*....Court is hereby authorized and empowered to satisfy said judgment of record.

OSCAR HENSON.....
....*Plaintiff*....
By....*Harry Jacobs, Attorney*....of Record.

STATE OF....*ILLINOIS*....
County of ..... *Cook* .....} ss.

....*Harry Jacobs*...., being first duly sworn, on oath....*says*....that [1](as....*attorney*....of record for....*Oscar Henson*) *plaintiff*....in whose favor the judgment above described was rendered, [2](....*he has*....authority to execute the foregoing satisfaction of judgment) and that up to the time the above satisfaction was executed [3](....*Oscar Henson*) *was*....still the....*owner*....of said judgment.

HARRY JACOBS....

NOTE. Add acknowledgment before authorized official. See No. 17.

Where satisfaction is executed by owner, instead of (1) should be substituted (....*he is*....the....); (2) should be omitted; instead of (3), should be (....*he*....).

D. (e) (4) Pleadings—Common Law—Notices.

167. Notice of Motion.

(For heading, see No. 144.)

....*August third*....A. D....*1914*....

To....*John McCarty*....
....*Attorney*....for....*Defendant*....

You are hereby notified, that on....*Friday*....the....*fourth*....day of ....*August*....A. D....*1914*....at the hour of....*ten A*....M., or as soon thereafter as counsel may be heard, ...*I*....shall appear before His Honor, Judge....*Tuthill*...., one of the judges of the....*Circuit*....Court of....*Cook*....County, in the room usually occupied by him as a court-

room, and in his absence before such other judge as may be hearing the motions of said Judge....*Tuthill*...., and [1](move the Court for an order permitting....*plaintiff*....to file certain additional counts to the declaration herein instanter and for a rule upon....*defendant*....to answer thereto in ....*ten*....days or within such other time as to the Court may seem fit).

At the aforesaid time and place, you may appear if you see fit.

JOHN FARRELL.....
....*Attorney*....for....*Plaintiff*....

Received copy of the above notice, this....*third*....day of....*August*.... A. D....*1914*....

JOHN McCARTY.....
....*Attorney*....for....*Defendant*....

Where receipt is refused, affidavit of service may be made as follows:

....*Henry Peabody*...., being first duly sworn, deposes and says that he served the above notice by leaving a copy of the same in the office of ....*John McCarty*....with [2](....*Clara Williams, a clerk*....in charge of said office) before the hour of....*four P*....M. on the....*third*.... day of....*August*....A. D....*1914*....

HENRY PEABODY....

NOTE. Add acknowledgment before authorized official. See No. 17.

D. (e) (5) Pleadings—Common Law—Removal Petition.

168. Petition for Removal.

(For heading, see No. 149.)

To the Honorable, the Judges of the....*Circuit*....Court of....*Cook*.... County, in the State of....*Illinois*....:

Your....*Petitioner, Milwaukee Northern Railroad Company, presents*.... to this court....*its*....petition for the removal of the above entitled cause to the District Court of the United States in and for the....*Eastern Division of the Northern*....District of the State of....*Illinois*.... Your said....*petitioner shows*....unto the court that....*it is*....not a....*citizen or resident*....of the State of....*Illinois*...., and that....*it was*....not ....*a citizen or resident*....of the State of....*Illinois*....at the time of the commencement of this suit, and that from thence hitherto....*it has*.... not been....*a citizen or resident*....of the State of....*Illinois*...., and that the subject matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum of....*Three Thousand* (*$3,000.00*)..... Dollars; that said suit is of a civil nature, and is brought by the ....*plaintiff*....against your....*petitioner, Milwaukee Northern Railroad Company, a corporation, defendant*...., to recover damages to the amount

[1] Such other motion as it is desired to make may be substituted.

[2] Where the service is personal, for the part in parentheses may be substituted (the said....*John McCarty*....).

of.....*Fifteen Thousand* (*$15,000.00*).....Dollars, which said sum of ....*Fifteen Thousand* (*$15,000.00*)....Dollars is claimed by the ....*plaintiff*....to be due to the said....*plaintiff*....from your....*petitioner*....

Your....*Petitioner*....further....*shows*....unto the court that this petition is made and filed before your....*petitioner is*....required by the laws of the State of....*Illinois*...., or the rules of this court, to answer or plead to the declaration or complaint of the....*plaintiff*....

Your....*Petitioner*....further....*shows*....that there is in this suit a controversy which is wholly between citizens of different States, and which can be fully determined between them; that is to say, between your ....*petitioner, Milwaukee Northern Railroad Company*...., and the ....*plaintiff*....; and your....*petitioner avers*....that....*it was*....at the time of the commencement of this suit, and....*has*....been continuously since then to the present time, and still....*is, a corporation organized and existing under the laws*....of the State of....*Ohio*....and of no other State, and that....*it was*....then, and....*is*....now, ...*a citizen and resident*....of the said State of....*Ohio*...., and of no other State, and that ....*it was*....not then and....*is*....not now, ...*a citizen or resident*.... of the State of....*Illinois*....; and your....*petitioner avers*....that the ....*plaintiff*....in this suit....*was*...., at the time of the commencement of this suit, and still....*is, a citizen*....of the State of....*Illinois*....

Your....*Petitioner*....further....*files*....herewith a bond, with good and sufficient surety for....*its*....entering in the District Court of the United States in and for the....*Eastern Division of the Northern*.... District of the State of....*Illinois*...., within thirty (30) days from the date of the filing of this petition, a copy of the record in the above entitled cause, and for paying all costs which may be awarded by the said District Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, and also for the appearing of said....*petitioner*....in said suit in the said District Court of the United States, and entering special bail, if special bail was originally required therein, and the doing of such other appropriate acts as by the Acts of Congress are required to be done upon the removal of such suit from said State Court to said District Court of the United States.

And Your....*Petitioner*....further....*prays*....that this honorable court proceed no further in said cause, except to enter an order for the removal of said cause to the said District Court of the United States, in and for the...*Eastern Division of the Northern*...District of...*Illinois*..., and to accept such surety and bond and to approve the same; all of which your....*petitioner prays*....shall forthwith be done.

And This Your....*Petitioner*....will ever pray.

MILWAUKEE NORTHERN RAILROAD COMPANY....
By....*Walker & Smith, Its Attorneys*....

STATE OF....*ILLINOIS*....}
County of ..... *Cook* .....} ss.

....*James Hardy*...., being duly sworn, on oath deposes and says that he is the....*Vice-President*....of the....*defendant*....in the above entitled cause, and....*petitioner*....herein; that he is authorized by the said

....*petitioner*....to make this affidavit on....*its*....behalf; that he has read the foregoing petition subscribed by....*Milwaukee Northern Railroad Company*....by....*its*....attorneys; that he knows the contents thereof, and that the allegations contained therein are true.

JAMES HARDY....

NOTE. Add acknowledgment before authorized official. See No. 17.

Notice of filing petition must be given to adverse parties. See No. 167. The motion should read instead of as in (1) in body of No. 167: "present to the court the petition and bond of the....*defendant*....for the removal of said cause to the District Court of the United States for the....*Northern*....District of....*Illinois, Eastern Division Thereof*....and ask the court to approve said bond and to proceed no further in said cause except to enter an order for removal of said cause as prayed in said petition." This notice should also contain a separate paragraph preceding the notice of appearance before the court, giving notice of the filing of the petition and bond with the Clerk of the Court before a certain hour, which should be prior to hour of appearance in court.

D. (e) (6) Pleadings—Common Law—General Issue.

169. Plea of Non Assumpsit with Affidavit and Set-off.

(For heading, see No. 144.)

And the said....*defendant, Frank Wagner*...., by....*William Flaherty, his attorney, comes and defends*....the wrong and injury when, etc., and ....*says*....that....*he*....did not undertake or promise, in manner and form as the said....*plaintiff has*....above thereof complained against ....*him*....and of this....*he puts himself*....upon the country, etc.

WILLIAM FLAHERTY.....

....*Defendant's Attorney*....

....*Frank Wagner*...., being duly sworn, on oath....*says*....that ....*he is the defendant*....in the above entitled cause, and that....*he*.... verily....*believes*....that....*he has*....a good defense to said suit, upon the merits, [1](to....*whole*....of said....*plaintiff's*....demand); [2](that the portion of said....*plaintiff's*....demand to which the....*defendant has*....a good defense is the amount of....*Two Hundred* [*$200.00*]....Dollars); and that the nature of such defense is that....*he*....did not....*order*.... the goods for which....*plaintiff seeks*....to recover, that....*he*....did not ....*promise to pay for*....said goods, and that....*he*....did not....*make use of*....said goods, and that....*he*....promptly notified said....*plaintiff*....that....*he was holding*....said goods at the order of said ....*plaintiff*....

FRANK WAGNER....

NOTE. Add acknowledgment before authorized official. See No. 17.

Use (1) or (2) as fits the situation.

The....*plaintiff*....in the above entitled cause will take notice, that on the trial of this cause, under the general issue above pleaded, the ....*defendant*....will give in evidence, and insist that the....*plaintiff was*....before and at the time of the commencement of this suit, and still ....*is*...., indebted to the....*defendant*....in the sum of....*One Hundred Fifty* (*$150.00*)....Dollars and....*no*....Cents, for money before that time lent and advanced to said....*plaintiff*....by said....*defendant*.... at said....*plaintiff's*....request; and also, in the....*like*....sum, for money before that time paid, laid out and expended for said....*plaintiff*.... by the said....*defendant*...., at the special instance and request of said ....*plaintiff*....; and in the....*like*....sum, for money before that time had and received by said....*plaintiff*....to and for the use of said ....*defendant*....; and also in the....*like*....sum, for goods, wares and merchandise, before that time sold and delivered by said....*defendant*.... to said....*plaintiff*...., at the special instance and request of said ....*plaintiff*....; and also in the....*like*....sum, for the labor, care and diligence of said....*defendant*....before that time done and performed by said....*defendant*....for said....*plaintiff*...., and at the special instance and request of said....*plaintiff*....; and also in the....*like*....sum, for other money before that time and then due and owing the said....*defendant*....for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from the said...*plaintiff*... to the said....*defendant*....; and also in the....*like*....sum, then and there found to be due and owing from said.....*plaintiff*.....to said ....*defendant*....on an account stated between them; and the said ....*defendant*....will on such trial offset and allow the said several sums of money so due and owing from said....*plaintiff*....to said....*defendant*....against any sum the said....*plaintiff*....may claim and prove in this action to be due....*him*...., and will ask the Court for a judgment against the said....*plaintiff*....for the balance, if any there be, due said ....*defendant*...., together with costs, etc.

WILLIAM FLAHERTY.....
....*Defendant's Attorney*....

NOTE. Only such of the above set-offs should be pleaded as it is expected may be proved. Any other special grounds existing may be added.

170. Plea of Not Guilty in Action of Case.

(For heading, see No. 150.)

Now....*comes*....the....*defendant, Chicago, Minneapolis and Saint Paul Railroad Company, a corporation*...., by....*Walker & Adams, its attorneys*.... and....*defends*....the wrong and injury, when, etc., where, etc., and....*says*....that....*it is*....not guilty of the said supposed several grievances above in the....*plaintiff's*....declaration heretofore filed herein, or in any count of said declaration, laid to the charge of said ....*defendant*...., in manner and form as the said....*plaintiff has*....in

the said declaration alleged against....*it*....; and of this the....*defendant puts itself*....upon the country, etc.

WALKER & ADAMS.....
....*Defendant's Attorneys*....

171. Plea of Non Est Factum in Action of Covenant.

(For heading, see No. 144.)

And the....*defendant*...., by....*Henry Brooks, his attorney, comes and defends*....the wrong and injury, when, etc., and....*says*....that the supposed writing obligatory in the said declaration mentioned is not....*his*.... deed; and of this....*he puts himself*....upon the country, etc.

HENRY BROOKS.....
....*Attorney*....for....*Defendant*....

172. Plea of Nil Debet in Action of Debt.

(For heading, see No. 144.)

And the....*defendant, Frank Wagner*...., by....*George Peabody, his attorney, comes and defends*....the wrong and injury, when, etc., and ....*says*....that....*he does*....not owe the said sum of money above demanded, or any part thereof, in manner and form as the....*plaintiff has*....above complained against....*him*....; and of this the....*defendant puts himself*....upon the country.

GEORGE PEABODY.....
....*Attorney*....for....*Defendant*....

173. Garnishment Answer.

Before....*John Petersen*....Esq., ...*J. P.*....
At....*Freeport, Illinois, July third*....A. D....*1914*....

.....*James Henry*.....
v.
....*Chicago Great Eastern Railroad Company*....
Garnishee of
.....*William Price*.....Defendant

Now comes....*Chicago Great Eastern Railroad Company*...., by....*John Simmons, its general counsel*...., and answers as garnishee:

Said garnishee answering says that at the time of service herein....*it*.... was indebted to....*William Price*...., employed at....*Freeport, Illinois*...., as....*freight handler*...., for wages earned in the service of....*this company*....for the month of....*July*....A. D....*1914*...., in the sum of ....*Eighty* (*$80.00*)....Dollars, which sum will be due and payable on the....*20th*....day of....*August*....A. D....*1914*....

Said....*company*....had no other moneys, rights, credits, effects or property of any kind or nature whatsoever, in....*its*....possession, or under....*its*....control, due or belonging to said defendant, at the time of service of the writ in this suit upon said....*company*...., nor at any time since then, except such amounts of money as may have become due to

said defendant for wages which....*he*....has earned since the service of the writ in this suit.

Said....*company*....further answering says that said....*William Price*.... is the head of a family, residing with the same and a resident of the State of....*Illinois*...., and that....*Sixty-three* (*$63.00*)....Dollars of said amount is exempt from garnishment, being exemption for....*four weeks and three days*...., leaving....*Seventeen* (*$17.00*)....Dollars subject to the order of the court.

Said garnishee having fully answered herein, asks to be discharged with ....*its*....costs and attorney's fees.

CHICAGO GREAT EASTERN RAILROAD COMPANY....
By....*John Simmons, General Counsel*....

NOTE. Properly acknowledged affidavit by duly authorized agent of the corporation should be added. See No. 168.

174. Plea of Non Cepit in Action of Replevin.

(For heading, see No. 144.)

And the....*defendant, Frank Wagner*...., by....*Charles Peabody, his attorney, comes and defends*....the wrong and injury, when, etc., and ....*says*....that....*he*....did not take the goods and chattels in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the....*plaintiff has*....above thereof complained against....*him*....; and of this the....*defendant puts himself*....upon the country.

CHARLES PEABODY.....
....*Attorney*....for....*Defendant*....

175. Plea of Not Guilty in Action of Trespass.

(For heading, see No. 144.)

And the....*defendant, Frank Wagner*...., by....*Charles Peabody, his attorney, comes and defends*....the wrong and injury, etc., and....*says*.... that....*he is*....not guilty of the said trespass or any part thereof in manner and form as in....*plaintiff's*....declaration alleged. And this ....*he prays*....may be inquired of by the country.

CHARLES PEABODY.....
....*Attorney*....for....*Defendant*....

176. Plea of Not Guilty in Action of Trover.

(For heading, see No. 144.)

And the....*defendant, Frank Wagner*...., by....*Charles Peabody, his attorney, comes and defends*....the wrong and injury, when, etc., and .....*says*.....that.....*he is*.....not guilty in manner and form as the ....*plaintiff has*....in....*his*....declaration alleged. And of this....*he puts himself*....on the country.

CHARLES PEABODY.....
....*Attorney*....for....*Defendant*....

D. (e) (7) Pleadings—Common Law—Special Pleas.

177. Plea of Want of Capacity.

(To be used when available in conjunction with plea of general issue and inserted before signature of defendant's attorney.)

And for a further plea in this behalf, ...*defendant says*....that the ....*plaintiff*....ought not to have....*his*....aforesaid action against ....*him*...., the....*defendant*...., because....*he says*....that....*he*...., the....*defendant*...., at the time of making the several supposed promises in the said declaration mentioned, was an....*infant*....within the age of....*21*....years, to wit, of the age of....*14*....years; and this ....*he is*....ready to verify: Wherefore....*he prays*....judgment if the....*plaintiff*....ought to have....*his*....aforesaid action against ....*him*...., etc.

NOTE. Any other legal disability may be set up, such as insanity.

178. Plea to the Jurisdiction.

(For heading, see No. 144.)

The said....*Frank Wagner, defendant*...., in....*his own person comes and defends*...., etc., and....*says*....that....*he was*....not served with process in the above entitled cause in the County of....*Cook*....; that ....*he is*....not....*a resident*....of the said County and....*was*....not at the time of commencement of this action....*a resident*....of said County; but that before the commencement of said action....*he was*.... and from thence hitherto....*has*....been and....*is*....still residing in the County of....*Lake*...., State of....*Indiana*...., and that service of process in said action was had on....*him*....in....*Lake*....County, State of....*Indiana*...., and this....*he is*....ready to verify; wherefore....*he prays*....judgment if the Court here will take cognizance of the action aforesaid.

FRANK WAGNER....

NOTE. General appearance should not be entered and no other plea should be filed where objection is made to the jurisdiction. Objections to the jurisdiction are waived by doing so. Only such of the above statements should be used as conform to the facts.

179. Plea of Lis Pendens.

(This plea may be inserted after plea of general issue. Where used separately, the usual heading and signature should accompany. See Nos. 144 and 176.)

And....*Frank Wagner, defendant*...., by....*George Peabody, his attorney, comes and defends*....the wrong and injury, when, etc., and ....*prays*....judgment of the writ, because....*he says*....that before the commencement of the above entitled cause, to wit, on the....*third*....

day of....*February*....A. D....*1914*....the said....*Oscar Henson*....impleaded....*this defendant*....in the....*Superior*....Court of....*Cook*.... County in a certain plea of trespass for the same cause of action as the declaration in the above entitled cause contains, as by the record thereof may more fully appear; and the said....*Frank Wagner*....further ....*says*....that the parties in this and in the said former suit are the same and not different persons, and that in the said former suit a judgment was entered against said....*Oscar Henson*....on the....*third*....day of....*April*....A. D....*1914*...., in the Court aforesaid; and this....*he is*....ready to verify.

Wherefore, the....*defendant prays*....judgment of the writ, and that the same may be quashed.

180. Plea of Non Joinder of Defendant.

(May be inserted after plea of general issue. Where used separately, the usual heading and signature should accompany. See Nos. 144 and 176.)

And the said....*Frank Wagner, defendant*...., by....*Charles Peabody, his attorney, comes and defends*...., etc., and....*prays*....judgment of the writ, because....*he says*....that the supposed promises mentioned in the declaration filed in the above entitled cause, if any such promises were made, were and each of them was made jointly with....*one Elmer Zuck, who is*....still living, and not by....*this defendant*....alone; and this the said....*Frank Wagner*....is ready to verify. Inasmuch, therefore, as the said....*Elmer Zuck is*....not named in the said writ together with the ....*defendant*...., the said....*Frank Wagner, defendant, prays*....judgment of the writ and that the same may be quashed, etc.

181. Plea of Non Ownership.

(This plea is practically never used except in conjunction with plea of general issue.)

And for a further plea in this behalf, the said....*defendant says*....that ....*he*....did not own, use, possess, control, direct, lease, manage or operate the appliances, machinery, equipment, mechanisms, devices, vehicles, premises, plant or business in said....*plaintiff's*....declaration mentioned as in said declaration, and in each count thereof alleged and laid to ....*his*....charge; and of this the said....*defendant puts himself*....upon the country, etc.

182. Plea of Nul Tiel Corporation.

(Used in conjunction with plea of general issue.)

For a further plea in this behalf, the defendant says that the....*plaintiff*....ought not to have....*his*....aforesaid action against it, the defendant, because there is not now nor was at the time of the commencement of this suit any such corporation as....*The Consolidated Auto Company*...., as by the said declaration is above supposed; and of this, the defendant puts itself upon the country.

183. Plea of Puis Darrein Continuance.

(For heading, see No. 144. This plea may be filed any time before the trial of the case, on proper notice to other party.)

Now, on the....*third*....day of....*May*....of this same term, ...*comes the defendant*...., by....*Charles Penn, his attorney*...., and....*says*.... that the....*plaintiff*....ought not to further maintain....*his*....aforesaid action against....*him*...., the....*defendant*...., because....*he says*...., that after the last proceedings in this cause, that is to say, after the ....*second*....day of....*May*...., in the....*April*....Term....*last past*...., and before this day, to wit, on the....*second*....day of ....*May*....A. D....*1914*...., the letters of administration granted to said....*plaintiff*....herein were revoked and said....*plaintiff has*....no right further to prosecute said cause of action on account of the things therein set forth. And this the....*defendant is*....ready to verify; wherefore....*he prays*....judgment if the....*plaintiff*....ought further to maintain....*his*....aforesaid action.

CHARLES PENN.....
....*Attorney*....for....*Defendant*....

184. Plea of Release.

(Used in conjunction with plea of general issue.)

And for a further plea in this behalf the....*defendant says*....that the ....*plaintiff*....ought not to have....*his*....aforesaid action against ....*him*...., the....*defendant*...., because....*he says*....that after the making of the several promises in the said declaration mentioned, and ....*before*....the commencement of this suit, to wit, on the....*third*.... day of....*February*....A. D....*1912*...., in the County of....*Cook*...., State of....*Illinois*...., the....*plaintiff*...., by....*his*....deed bearing date of that day, and now to the Court here shown, released to the ....*defendant*....the said several promises, and all demands and cause of action whatsoever which the....*plaintiff*....then had against the....*defendant*...., or might thereafter have or allege against....*him*...., by reason of any matter or thing previous to that time; as by the said deed, reference being thereto had, will fully appear: and this the....*defendant is*....ready to verify; wherefore....*he prays*....judgment if the....*plaintiff*....ought to have....*his*....aforesaid action against....*defendant*...., etc.

NOTE. Add verbatim copy of release relied upon.

185. Plea of Replication De Injuria.

(For heading, see No. 144.)

And the....*plaintiff*...., as to the plea of the....*defendant*....by ....*him first*....above pleaded, ...*says*....that....*he*...., the....*plaintiff*...., by reason of anything in that plea alleged, ought not to be barred from having....*his*....aforesaid action, because....*he says*...., that the ....*defendant*...., at the said time, when, etc., in the said declaration mentioned, of....*his*....own wrong, and without the cause by....*him*....in

that plea mentioned, did commit the said several grievances in the said plea mentioned, in manner and form as the....*plaintiff has*....in....*his*.... declaration above thereof complained against....*him*...., the....*defendant*.... And of this the....*plaintiff prays*....further replication of ....*him*....by the country, etc.

JOHN FARRELL.....

....*Attorney*....for....*Plaintiff*....

186. Plea of Son Assault Demesne.

(For heading, see No. 144.)

And the....*defendant*...., by....*Edward Flanagan, his attorney, comes and defends*....the force and injury, when, etc., and....*says*....that the ....*plaintiff*....ought not to have....*his*....aforesaid action against ....*him*...., the....*defendant*...., because....*he says*....that the ....*plaintiff*....just before the said time when, etc., to wit, on the same day in the said declaration mentioned, with force and arms, etc., in the County aforesaid, made an assault upon the....*defendant*...., and would then and there have beaten, bruised and ill-treated....*him*...., if....*he*.... had not defended....*himself*....against the....*plaintiff*....; wherefore the....*defendant*....did then and there defend....*himself*....against the ....*plaintiff*...., as....*he*....lawfully might for the cause aforesaid, and in so doing did commit the supposed trespasses in the said declaration mentioned: and so the....*defendant says*...., that if any hurt or damage then and there happened to the....*plaintiff*...., the same was occasioned by the said assault so made by the....*plaintiff*....upon....*him*...., the ....*defendant*...., and in....*his*....necessary defense of....*himself*.... against the....*plaintiff*.... And this the....*defendant is*....ready to verify; wherefore....*he prays*....judgment if the....*plaintiff*....ought to have....*his*....aforesaid action against....*him*...., etc.

EDWARD FLANAGAN.....

....*Attorney*....for....*Defendant*....

187. Plea of Statute of Frauds.

(Commonly used in conjunction with plea of general issue.)

And for a further plea in this behalf, the....*defendant says*....that the ....*plaintiff*....ought not to have....*his*....aforesaid action against ....*him*...., the....*defendant*...., because....*he says*....that each and every one of the several supposed promises in the said declaration mentioned was an agreement which was not to be performed within the space of....*one year*....from the time of the making thereof, to wit, the ....*fourth*....day of....*January*....A. D....*1912*...., and was not, nor is, nor was, nor is any memorandum or note thereto, in writing, signed by the....*defendant*...., or by any other person thereunto by....*him*.... lawfully authorized, according to the form required by statute, etc., and this the....*defendant is*....ready to verify; wherefore....*he prays*.... judgment if the....*plaintiff*....ought to have....*his*....aforesaid action against....*him*...., etc.

188. Plea of Statute of Limitations.

(Used in conjunction with plea of general issue.)

And for a further plea in this behalf, the....*defendant says*....that the....*plaintiff*....ought not to have....*his*....aforesaid action against ....*him*...., the said....*defendant*...., because....*he says*....that the said cause of action in said declaration, and in each count thereof, alleged accrued to the....*plaintiff*....more than....*two*....years prior to the filing of said declaration; and this the said....*defendant is*....ready to verify, etc., wherefore....*he prays*....judgment, etc.

D. (e) (8) Pleadings—Common Law—Praecipe.

189. Praecipe.

STATE OF....*ILLINOIS*....
County of ..... *Cook* ..... } ss.

....*Circuit*....Court of....*Cook*....County.
....*June*....Term, A. D....*1914*....

....*Charles Jones, Plaintiff*....
v.
....*William Smith, Defendant*....
} ....*Trespass on the Case*....
Damages, $....*10,000.00*....

The Clerk of said Court will issue a Summons in the above entitled cause to said....*Defendant*....in a plea of....*trespass on the case*....to the damage of said....*Plaintiff*...in the sum of...*Ten Thousand* (*$10,000.00*)... Dollars, direct the same to the sheriff of....*Cook*....County to execute and make it returnable to the....*June*....Term of said Court, A.D....*1914*....

JOHN MARTIN.....
....*Plaintiff's Attorney*....

TO....*Joseph E. Bidwill, Jr*....CLERK.

....*Chicago, June third*....A. D....*1914*....

D. (e) (9) Pleadings—Common Law—Subpoenas.

190. Duces Tecum Subpoena.

STATE OF....*ILLINOIS*....
County of ..... *Cook* ..... } ss. The People of the State of..*Illinois*..

TO....*James Warner, 1213 W. Ohio Street, and Henry Simmons, 1112 S. Paulina Street*...., GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you attend before the Honorable....*Judge Williams*...., one of the Judges of our....*Circuit*....Court of....*Cook*....County, on the....*third*....day of....*June*....A. D....*1914*....at....*two*....o'clock in the....*afternoon*....at his Court Room in....*Chicago*...., in said County, to testify and give evidence in a certain cause now pending and undetermined in said Court, wherein....*William Price is Plaintiff*....and ....*Acme Hardware Company is Defendant*....on the part of the said ....*plaintiff*....and that you also diligently and carefully search for, examine and inquire after and bring with you and produce at the time and

place aforesaid, a certain....*ledger and cash book kept by you as cashiers for said defendant containing the account of said defendant with said plaintiff*....together with all copies, drafts and vouchers relating to the said documents, and all other documents, letters and paper writings whatsoever, that can or may afford any information or evidence in said cause; and this you shall in no wise omit under penalty of the law; and have you then and there this Writ.

WITNESS, ...*John W. Rainey*...., Clerk of our said Court, and the Seal thereof, at....*Chicago*...., in said County, this....*second*....day of....*June*.... A. D....*1914*....

[COURT SEAL]

JOHN W. RAINEY....
CLERK.

NOTE. Subpoena is often directed to the Sheriff as in No. 191.

191. Personal Subpoena.

STATE OF....*ILLINOIS*....
County of ..... *Cook* .....} ss. The People of the State of..*Illinois*..
To the Sheriff of said County, GREETING:

WE COMMAND THAT YOU SUMMON....John Dennison, 121 W. Division Street...., if....*he*....shall be found in your County, personally to be and appear before the....*Circuit*....Court of....*Cook*....County, on the....*fourth*....day of....*June*....A. D....*1914*...., at....*two*.... o'clock....*P*....M., before the Hon....*Judge Walker*...., Room....*706*.... at the Court House, in the City of....*Chicago*...., in said County, to testify and the truth to speak in a certain case now pending and undetermined in said Court, wherein....*William Brady is Plaintiff*....and ....*John Simpson is Defendant*...., on the part of the said....*defendant*...., and this....*he*....shall in no wise omit under the penalty of the law; and have you then and there this Writ.

WITNESS, ...*John W. Rainey*...., Clerk of our said Court, and the Seal thereof, at....*Chicago*...., this ....*third*....day of....*June*....A. D....*1914*....

[COURT SEAL]

JOHN W. RAINEY....
CLERK.

NOTE. Subpoena is frequently addressed to the party personally, as in No. 190.

D. (e) (10) Pleadings—Common Law—Summons.

192. Garnishment Summons.

STATE OF....*ILLINOIS*....
County of ..... *Cook* .....} ss. The People of the State of..*Illinois*..
To the....*Bailiff*....of the....*Municipal*....Court of....*Chicago*...., GREETING:

WE COMMAND YOU THAT YOU SUMMON....Chicago Great Eastern Railroad Company...., if....*it*....shall be found in your....*City*....,

personally to be and appear before the....*Municipal*....Court of....*Chicago*....at the....*City Hall*....in the....*City of Chicago*...., being one of the places in said....*City of Chicago*....provided by the corporate authorities thereof for the holding of the same at....*9:30 A*....M., on ....*Monday*...., the....*thirtieth*....day of....*July*....A.D....*1914*...., then and there to answer unto....*James Henry*....as to the rights, credits, choses in action, effects, estate, property or moneys, in....*its*....hands belonging to the said....*William Price*....

And have you then and there this Writ, with the endorsement thereon, in what manner you shall have executed the same.

WITNESS, ...*Frank P. Danisch*...., Clerk of our said Court, and the Seal thereof, at....*Chicago*...., aforesaid, this....*twentieth*....day of....*July*....A. D. ....*1914*.... *FRANK P. DANISCH*....
CLERK.

[COURT SEAL]

193. Law Summons.

STATE OF....*ILLINOIS*....} ss. The People of the State of..*Illinois*..
County of ..... *Cook* .....}

To the Sheriff of said County, GREETING:

WE COMMAND YOU THAT YOU SUMMON....*William Smith*...., if....*he*....shall be found in your County, personally to be and appear before the....*Circuit*....Court of....*Cook*....County, on the first day of the term thereof, to be holden at the Court House, in the....*City of Chicago*...., in said....*Cook*....County, on the....*third Monday*....of ....*June*....A. D....*1914*...., to answer unto....*Charles Jones*....in a plea of....*trespass on the case upon promises*...., to the damage of said....*plaintiff*...., as it is said, in the sum of....*Ten Thousand* (*$10,000.00*)....Dollars.

And have you then and there this Writ, with an endorsement thereon, in what manner you shall have executed the same.

WITNESS, ...*Joseph E. Bidwill, Jr*...., Clerk of our said Court, and the Seal thereof, at....*Chicago*...., in said County this....*third*....day of....*June*....A. D. ....*1914*.... *JOSEPH E. BIDWILL, JR*....
CLERK.

[COURT SEAL]

D. (e) (11) Pleadings—Common Law—Writs.

194. Attachment Writ in Aid.

STATE OF....*ILLINOIS*....} ss. The People of the State of..*Illinois*..
County of .....*Cook*.....}
To the Sheriff of....*Cook*....County, GREETING:
In....*Circuit*....Court of....*Cook*....County.

....*John Williamson*....
v. } Attachment in Aid. No.....*25030*....
....*James Smith*....

WHEREAS, ...*John Williamson hath*....complained on oath to the ....*Circuit*....Court of....*Cook*....County, that the said above named

....*plaintiff*....commenced heretofore the above entitled action, and that the same is still pending, and that the said....*defendant is*.... justly indebted to said....*plaintiff*....to the amount of....*Five Hundred* (*$500.00*)....Dollars and....*No*....Cents, and oath having also been made that the said....*defendant is*....not....*a resident*....of this State, and that....*his place*....of residence....*is*....at....*Clinton, Iowa*...., or [1] that upon diligent inquiry, ...*affiant has*....been unable to ascertain ....*his place*....of residence, or that....*he conceals himself*....or ....*stands*....in defiance of an officer, so that process cannot be served upon....*him*...., or that....*he has*....departed from this State, with the intention of having....*his*....effects removed from this State, or that ....*he is*....about to depart from this State, with the intention of having ....*his*....effects removed from this State, or that....*he is*....about to remove....*his*....property from this State, to the injury of the said....*plaintiff*...., or that....*he has*...., within....*two*....years last past, fraudulently conveyed or assigned....*his*....effects, or a part thereof, so as to hinder and delay....*his*....creditors, or that....*he has*...., within ....*two*....years last past, fraudulently concealed or disposed of....*his*.... property, so as to hinder and delay....*his*....creditors, or that....*he is*.... about fraudulently to conceal, assign or otherwise dispose of....*his*.... property or effects so as to hinder and delay....*his*....creditors, and the said....*plaintiff*....having given bond and security according to the directions of the Act in such case made and provided,

WE THEREFORE COMMAND YOU, that you attach so much of the lands, goods, chattels, rights, moneys, credits and effects of the said ....*defendant, James Smith*...., to be found in your County, as shall be of value sufficient to satisfy the said debt and costs, according to the said complaint; and such lands, goods, chattels, rights, moneys, credits and effects, so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at a term of said ....*Circuit*....Court of....*Cook*....County, to be holden at....*Chicago*...., within and for the County of....*Cook*...., on the....*fifteenth*....day of ....*May*....A. D....*1914*...., so as to compel the said....*defendant, James Smith*...., to appear and answer the complaint of said....*plaintiff*...., and that you also summon....*State Bank of Chicago*....as....*garnishee*...., to be and appear at the said Court on the said....*fifteenth*....day of ....*May*....A. D....*1914*...., then and there to answer to what may be objected against....*it*....when and where you shall make known to the said Court how you have executed this Writ. And have you then and there this Writ.

WITNESS, ...*Joseph E. Bidwill, Jr*....., Clerk of our said Court, and the Seal thereof, at....*Chicago*...., in [COURT SEAL] said County, this....*fourth*....day of....*April*....A. D. ....*1914*....

JOSEPH E. BIDWILL, JR....
CLERK.

[1] The particular grounds applicable should be used.

195. Execution Writ.

STATE OF....*ILLINOIS*....
.....*City of Chicago*.....
.....*First District*.....
} ss. The People of the State of ..*Illinois*..

To the....*Bailiff*....of the....*Municipal*....Court of....*Chicago*....,
GREETING:

WE COMMAND YOU, that of the lands and tenements, goods and chattels of....*Henry Adams, 143 W. Wrightwood Avenue, plaintiff*...., in your ....*City*...., you cause to be made the sum of....*Four* (*$4.00*)....Dollars and....*Fifty*....Cents, which....*John Willard, defendant*...., lately in the....*Municipal*....Court of....*Chicago*...., on the....*first*....day of....*March*....A. D...*1914*..., recovered against the said...*plaintiff*..., and which by the said Court was adjudged to the said....*defendant*...., for....*his*....costs and charges in that behalf expended, whereof the said ....*plaintiff is*....convicted, as appears to us of record.

And have that money ready to render to the said....*defendant*...., for ....*his*....costs aforesaid, and make return of this Writ, with an endorsement thereon as to the manner you shall have executed the same, in ....*ninety*....days from the date hereof.

WITNESS, ...*Homer K. Galpin*...., Clerk of our said Court, and the Seal thereof, at....*Chicago*....,
[COURT SEAL] in said County, this....*fourth*....day of....*April*....
A. D....*1914*....

HOMER K. GALPIN....
CLERK.

196. Replevin Writ.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....
} ss. The People of the State of..*Illinois*..

To the Sheriff of said County, GREETING:

WHEREAS, ...*William Warren, plaintiff, complains*....that....*James Brady, defendant*...., unlawfully and wrongfully....*has*....taken and ....*does*....detain the following described goods and chattels, to wit: ....*two cows*....of the value of....*Ninety* (*$90.00*)....Dollars,

THEREFORE, WE COMMAND YOU, that if the said....*plaintiff*.... shall give you bond with good and sufficient security, in double the value of said goods and chattels, as required by law, to prosecute....*his*....suit in this behalf with effect and without delay, and to make return of the said goods and chattels, if return thereof shall be awarded, and to save and keep you harmless in replevying said goods and chattels, that you cause the said goods and chattels to be replevied and delivered to the said....*plaintiff*.... without delay; and also that you summon the said....*defendant*.... to be and appear before the....*Circuit*....Court of....*Cook*....County, on the first day of the next term thereof, to be holden at the....*City*.... of....*Chicago*...., in said County, on the....*third Monday*....of....*April next*...., to answer said....*plaintiff*....in the action; or in case the above mentioned property, or any part thereof, is not found and delivered

to you, to answer said....*plaintiff*....for the value of the property not found and delivered, as aforesaid.

And have you then and there this Writ, with an endorsement thereon in what manner you shall have executed the same, together with the bond which you shall have taken from the said....*plaintiff*...., as before commanded, before executing this Writ.

WITNESS, ...*Joseph E. Bidwill, Jr.*...., Clerk of said Court, and the Seal thereof, at....*Chicago*....in said County, this....*fifth*.....day of.....*February*.....A. D. ....*1914*....

[COURT SEAL]

JOSEPH E. BIDWILL, JR....
CLERK.

197. Writ of Restitution.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....
.....*City of Chicago*.....
.....*First District*.....
} ss. The People of the State of..*Illinois*..

To the....*Bailiff*....of the....*Municipal*....Court of.....*Chicago*....., GREETING:

WHEREAS, ...*Union Autograph Company, plaintiff*...., did on, to wit: the....*first*....day of.....*March*.....A. D.....*1914*....., obtain in the ....*Municipal*....Court of....*Chicago*...., a judgment against....*Henry Bodie, defendant*....in an action of forcible detainer, for the restitution of the premises situated in the....*City of Chicago*.... County of....*Cook*.... and State of....*Illinois*...., following, to wit: ....*at 243 W. 118th Street*...., and also for....*Ten* (*$10.00*)....Dollars, costs,

WE THEREFORE COMMAND YOU, in the name and by the authority of the said People, to dispossess the said....*defendant*....and restore the said....*plaintiff*....to the possession of said premises. And you are also hereby commanded, that of the goods and chattels, lands and tenements of the said....*defendant*....in your....*City*...., you make the sum of....*Ten* (*$10.00*)....Dollars and....*No*....Cents, being the amount of costs in said suit. Hereof make due return as the law directs.

WITNESS, ...*Homer K. Galpin*...., Clerk of our said Court, and the Seal thereof, at....*Chicago*...., aforesaid, this....*fourth*....day of....*May*....A. D....*1914*....

[COURT SEAL]

HOMER K. GALPIN....
CLERK.

198. Writ of Scire Facias to Revive Judgment.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....
} ss. The People of the State of..*Illinois*..

To the Sheriff of said County, GREETING:

WHEREAS, at the....*April*....Term of the....*Superior*....Court of ....*Cook*....County, held in and for the County of....*Cook*....and State of....*Illinois*...., to wit: on the....*third*....day of.....*May*.....A. D.

....*1914*...., before the said Court, then judicially sitting at the Court House in the....*City*....of....*Chicago*...., in said County, ...*James Warren, plaintiff*...., by the judgment and consideration of our said Court, recovered a judgment in a certain action then pending in said Court against ....*Albert Price*....for the sum of....*Five Hundred* (*$500.00*)....Dollars and....*Forty*....Cents damages and the costs of suit, as appears to us of record.

AND NOW on behalf of the said....*plaintiff*...., we have been informed that said judgment still remains in full force and effect, and in no wise set aside, reversed, paid off or satisfied, and that execution of the judgment, damages and costs aforesaid still remain to be made to....*James Warren*...., wherefore the said....*plaintiff hath*....besought us to provide ....*him*....a proper remedy in this behalf.

WE DO THEREFORE HEREBY COMMAND YOU THAT YOU SUMMON the said....*Albert Price*...., if....*he*....shall be found in your County, personally to be and appear before the said....*Superior*....Court of....*Cook*....County, on the first day of the next Term thereof, to be holden at the Court House in the....*City*....of....*Chicago*...., in said ....*Cook*....County, on the....*first Monday*....of....*February next*...., then and there to show cause, if any....*he*....have or can show, why the said judgment should not be revived and remain in full force and effect; and furthermore, why execution should not issue against....*him*....for the judgment, damages and costs of suit, according to the force, form and effect of the said recovery; and further to do and receive what shall then and there be adjudged by our said Court in the premises.

And have you then and there this Writ, with your return thereon in what manner you shall have executed the same.

WITNESS, ...*Charles W. Vail*...., Clerk of our said Court, and the Seal thereof, at....*Chicago*...., in said County, this....*third*....day of.....*September*.....A. D. [COURT SEAL] ....*1914*....

CHARLES W. VAIL....
CLERK.

[1]D. (f) Pleadings—Criminal Law.

199. Habeas Corpus Petition.

STATE OF....*ILLINOIS*....
County of.....*Stephenson*.....} ss.

In the....*Circuit*....Court of....*Stephenson*....County.

....*James Simpson, Petitioner*....
v.
.....*Frank Brady, Defendant*.....} Gen. No....*17162*....

To the Honorable....*James Ward*...., Judge of said Court:

Your....*petitioner, James Simpson*....of....*Freeport*...., in the County of....*Stephenson*...., State of....*Illinois*...., complaining....*shows*....

[1] For indictments, see III M. A. L., pp. 337 to 340.

that....*he is*....detained and imprisoned in the jail of....*Cook*.... County on a charge of....*burglary*....by virtue of a certain warrant for the commitment of your....*petitioner*...., a copy whereof is hereto annexed, and that the detention and imprisonment of your....*petitioner*....are unjust and contrary to law.

And your....*petitioner*....further....*shows*....that the evidence upon which the said commitment was based was in substance as follows:....*a certain Frank Jones swore he saw petitioner going south on a certain street one block north from the house where the deed is said to have been committed thirty minutes after the deed is thought to have been committed*....

And your....*petitioner*....further....*shows*...., that....*he is*....not committed or detained by virtue of any process, judgment, decree or execution issued by any court or judge of the United States in a case where such court or judge has exclusive jurisdiction, nor by virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree, nor for any treason, felony, or other crime committed in any other State or Territory of the United States for which he ought, by the Constitution and laws of the United States, to be delivered up to the executive power of such State or Territory.

TO BE RELIEVED FROM WHICH SAID DETENTION and imprisonment your....*petitioner*....now....*applies*...., praying that a writ of habeas corpus, to be directed to the said....*Frank Brady*...., may issue in this behalf pursuant to the statute in such case made and provided, so that your....*petitioner*....may be forthwith brought before this Honorable Court to do, submit to and receive what the law may require.

....*FRANK HAWLEY*.... *JAMES SIMPSON*....
....*Attorney*....for....*Petitioner*....

STATE OF....*ILLINOIS*....
County of....*Cook*.....} ss.

....*James Simpson*...., the....*petitioner*....above named, being first duly sworn, on oath....*says*....that....*he has*....read the foregoing petition by....*him*....subscribed, and knows the contents thereof, and that the same is true of....*his*....own knowledge, except as to the matters and things therein stated to be upon information and belief, and as to those matters....*he believes*....it to be true.

NOTE. Add acknowledgment before authorized official.

200. Habeas Corpus Writ.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....} ss. The People of the State of..*Illinois*..

To....*Frank Brady*...., Sheriff of....*Cook*....County, GREETING:

WE COMMAND YOU, that you do forthwith, without excuse or delay, bring or cause to be brought before our....*Superior*....Court of....*Cook*.... County, now in session at the Court House in....*Chicago*...., in said County, the body of....*James Simpson*...., by whatever name or names ....*he is*....known or called, and who....*is*....unlawfully detained in your custody (as it is represented unto....*John Williams*...., one of the Judges

of said Court, by the petition of....*James Simpson*....), together with the day and cause of arrest and detention; then and there to perform and abide such order and directions as our said....*Superior*....Court of ....*Cook*....County shall make in that behalf.

HEREOF make due return forthwith under the penalty of what the law directs.

WITNESS, ...*Charles W. Vail*...., Clerk of our said ....*Superior*....Court of.....*Cook*.....County, and the [COURT SEAL] Seal thereof, at....*Chicago*...., in said County and State, this....*fourth*....day of....*May*....A. D....*1914*....

CHARLES W. VAIL....
CLERK.

To the Sheriff of said County to deliver.

201. Information by Individual.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....} ss.
.....*City of Chicago*.....

In the....*Municipal*....Court of....*Chicago*....

....*William Ward*...., a resident of the....*City of Chicago*...., in the County and State aforesaid, in....*his*....own proper person, comes now here in Court and, in the name and by the authority of the People of the State of....*Illinois*...., gives the Court to be informed and understand, and states the facts to be, that....*Harry Smith*...., late of the said ....*City of Chicago*...., heretofore, to wit, on the....*first*....day of ....*August*....A. D....*1914*...., at the....*City of Chicago*...., in said County of....*Cook*...., in the State of....*Illinois*....aforesaid, ...*forcibly entered the home of William Ward at 243 N. Paulina Street, and goods*....of the value of....*Two Hundred* (*$200.00*)....Dollars, the personal goods and property of....*William Ward*....then and there being found, did then and there wrongfully and unlawfully take, steal and carry away, contrary to the statute in such case made and provided, and against the Peace and Dignity of the People of the State of....*Illinois*....

WILLIAM WARD....

NOTE. Add properly acknowledged affidavit by the individual of the truth of the statements made. See No. 199.

202. Mittimus.

UNITED STATES OF AMERICA.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....} ss.
.....*City of Chicago*.....

In the....*Municipal*....Court of....*Chicago*....

PLEAS, PROCEEDINGS AND JUDGMENTS, before the....*Municipal*....Court of....*Chicago*...., held in the....*City of Chicago*...., in the County of....*Cook*....and State of....*Illinois*...., at the place in the

....*First District*....in said....*City*...., provided by the corporate authorities of said....*City*....for the holding of said Court, in the year of our Lord, one thousand nine hundred and....*fourteen*...., and of the independence of the United States, the one hundred and....*thirty-eighth*....

Present: Honorable....*John P. Williams*....

One of the Judges of the....*Municipal*....Court of....*Chicago*....

Attest: *Maclay Hoyne, State's Attorney*....

Frank P. Danisch, Clerk.... *Anton J. Cermak, Bailiff*.....

BE IT REMEMBERED, that heretofore, to wit: on the....*fifth*....day of....*August*....A. D....*1914*...., the following, among other proceedings, were had in said Court and entered of record therein:

The People of the State of....*Illinois*....
v.
.....*Henry Allen*.....
} Examination for....*failure to enter recognizance*....
No....*210546*....

This day again come the said People, by the State's Attorney, and the said defendant also comes in his own proper person; and now the said defendant not saying anything further why the judgment of the Court should not now be pronounced against him on the complaint for examination heretofore filed against said defendant in this cause, and the Court having examined witnesses in the Court and in the presence of said defendant, it is considered by the Court and the Court finds that the crime of....*larceny*....has been committed, and that there is probable cause to believe the said....*Henry Allen*....guilty of said crime.

It is therefore ordered that the said defendant be and he is hereby held to the....*Criminal*....Court of....*Cook*....County, to be and appear at the said....*Criminal*....Court of....*Cook*....County on the first day of the next term thereof, to be held at the....*Criminal Court building*.... in the....*City of Chicago*...., in said County, on the....*first*....day of ....*October*....A. D....*1914*...., at the opening of Court on that day and from day to day and from term to term, and from day to day of each term until the final sentence or order of said Court, to answer for the said crime and to abide by such final sentence or order; and it is further ordered that said defendant enter into a recognizance to the People of the State of....*Illinois*...., in the penal sum of....*Five Thousand* (*$5,000.00*).... Dollars, conditioned upon his appearance as aforesaid.

And said....*Henry Allen*....having failed to enter into such recognizance as aforesaid,

It is ordered that said defendant be taken from the bar of this Court by the Bailiff to the common jail of....*Cook*....County, and delivered to the keeper thereof; and that he be taken by said keeper and confined by him in said jail until the final sentence or order of said....*Criminal*.... Court of....*Cook*....County, or until discharged by due process of law.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....
.....*City of Chicago*.....
} ss.

I, ...*Frank P. Danisch*....., Clerk of the.....*Municipal*.....Court of ....*Chicago*...., do hereby certify the above and foregoing to be a true,

perfect and complete copy of certain proceedings had and entered of record in said Court, in the case of the People of the State of....*Illinois*....v. ....*Henry Allen*....

WITNESS, ...*Frank P. Danisch*...., Clerk of said Court, and the Seal thereof, at the....*City of Chicago*...., [COURT SEAL] aforesaid, this....*ninth*....day of.....*August*.....A. D. ....*1914*....

FRANK P. DANISCH....
CLERK.

203. Petition for Change of Venue.

STATE OF....*ILLINOIS*....
County of.....*Cook*.....
.....*City of Chicago*.....
.....*First District*..... } ss.

In the....*Municipal*....Court of....*Chicago*....

The People of the State of....*Illinois*....
v. } Gen. No....*211549*....
.....*Herman Frank*.....

The....*petitioner, Herman Frank*...., respectfully....*shows*....to the said Court that....*he, the petitioner, fears*....that....*he*....will not receive a fair trial in said Court if the said cause is tried before the Honorable ....*Judge Henry Walker*...., one of the judges of said Court, on account that the said judge is prejudiced against....*him, the petitioner*...., so that ....*he*....cannot expect a fair trial in the said Court.

....*Petitioner*....therefore....*prays*....a change of venue in this cause or for any order that the said cause be tried before some other judge than the said....*Judge Henry Walker*...., pursuant to the statute in such case made and provided.

HERMAN FRANK....

Add properly acknowledged affidavit by....*petitioner*....of the truth of statements made. See No. 199.

E. Probate Forms.

204. Application for Letters Testamentary.

STATE OF....*ILLINOIS*....
County of ..... *Cook* ..... } ss.

In the....*Probate*....Court of....*Cook*....County.

To the Honorable....*Charles S. Cutting*...., Judge of said Court:

THE PETITION OF....*Robert Hayes*....respectfully showeth that ....*he is*....a resident of said County; that on the....*ninth*....day of ....*September*....A. D....*1914, Robert James Hayes*...., of....*Evanston*...., in said County, departed this life at....*Evanston Hospital*...., leaving a last will and testament, duly signed and attested, as your....*peti-*

tioner believes...., which....*he*....now....*presents*....to Your Honor for Probate. That said....*Testator*....in said will nominated your....*petitioner executor*....thereof. That said deceased left property and effects as follows:

Personal estate not to exceed in value....*Four Thousand* (*$4,000.00*).... Dollars.

Real estate not registered under Torrens Act not to exceed in value ....*Five Thousand* (*$5,000.00*)....Dollars.

Real estate registered under Torrens Act not to exceed in value....*Two Thousand* (*$2,000.00*)....Dollars.

That said....*Testator*....left visible estate more than sufficient to pay ....*his*....debts.

That the value of the whole estate of said deceased does not exceed ....*Twelve Thousand* (*$12,000.00*)....Dollars.

That said deceased left....*him*....surviving:

NAMES	RELATIONSHIP	RESIDENCE
...*Robert Hayes*...	.....*Son*.....	....*1920 Chicago Ave., Evanston*....
.....	.....	.....
.....	.....	.....
.....	.....	.....

....*his*....only....*heir*....at law. That the names and residences of the Legatees and Devisees under the will of said deceased are as follows:

NAMES	RELATIONSHIP	RESIDENCE
...*Robert Hayes*...	.....*Son*.....	.....*1920 Chicago Ave., Evanston*.....
...*George Hayes*...	....*Cousin*....	.....*Riverside, California*.....
...*Frank Hayes* ...	...*Nephew*...	.....*Bangor, Maine*.....

That the....*petitioner resides*....at No....*1920 Chicago Ave., Evanston*...., and....*is*....willing to accept and undertake the trust confided to....*him*....in said will, wherefore your....*petitioner prays*....that said will may be admitted to probate and letters testamentary thereon may be issued to....*Robert Hayes*....after proper hearing and proof, and that the hearing on said petition may be set for the....*tenth*....day of ....*October*....A. D....*1914*....at....*two*....o'clock....*P*....M., or as soon thereafter as the matter can be heard, and that all other orders necessary may be made.

Your....*petitioner*....further....*represents*....to Your Honor that ....*James Smith, Frank Peabody*....and....*Harry Parkin*....are persons of discretion, not related to the deceased or interested in the administration of....*his*....estate, and....*he*....respectfully....*recommends*.... their appointment by the Court as appraisers. *ROBERT HAYES*....

NOTE. Should be acknowledged before an authorized official, usually before Clerk of the Court.

205. Assignment of Dower.

THIS INDENTURE, Made this....*sixth*....day of....*August*.... A. D....*1914*....between....*Henry Porter*...., of....*Cook*....County, in the State of....*Illinois, party*....of the first part, and....*Rebecca Por-*

ter...., of....*Cook*....County, in the State of....*Illinois*...., widow of ....*Francis Porter*...., party of the second part, *WITNESSETH:*

WHEREAS, said....*Francis Porter*....was, in his lifetime and at the time of his death, seized of certain lands and tenements in fee simple which by reason of the decease of said....*Francis Porter*....descended to said....*Henry Porter*...., subject to the dower right of....*Rebecca Porter*....

NOW, THEREFORE, said....*Henry Porter does*....hereby endow, assign and set over unto said....*Rebecca Porter*....and said....*Rebecca Porter*....agrees to receive and accept as said dower and her right thereunder, one-third of all lands and tenements of said....*Francis Porter*...., which portion so set aside is described as follows: ....*Northwest One-Quarter* (¼)....of Section....*Six* (*6*)...., Township....*Four* (*4*), *North*.... Range....*Five* (*5*), *East*....of the....*Third*....Principal Meridian, TO HAVE AND TO HOLD the same unto the said....*Rebecca Porter*....for and during her natural life in the name of Dower and in satisfaction of all dower rights that she ought to have in or to the said lands and tenements which belonged to the said....*Francis Porter*....

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and date first above written.

HENRY PORTER.....[SEAL]
REBECCA PORTER....[SEAL]

206. Codicil to a Will.

I, ...*Albert Smith*...., of....*Mount Carroll*...., in the County of ....*Carroll*...., in the State of....*Illinois*...., hereby declare this to be a codicil to my will, which bears date of the....*third*....day of....*June*.... A. D....*1910*....

WHEREAS, my....*son Frederick*....died on the....*fourth*....day of ....*July*....A. D....*1914*...., leaving....*two*....children, now I hereby declare that such of the children of my said....*son Frederick*....as shall survive me, and being male attain the age of....*21*....years, or being female attain that age....*or marry*...., shall take by substitution as tenants in common, in equal shares if more than one, the share of my residuary estate which my said....*son*....would have taken had....*he*....survived me, and in all other respects I confirm my said will.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ....*tenth*....day of....*August*....A. D....*1914*....

Witnesses: *ALBERT SMITH*....
....*JOHN SMITH* .....
....*WILLIAM PRENTISS*....
....*HARRY WARD* .....

207. Petition for Appointment of Conservator.

STATE OF....*ILLINOIS*....}
County of ..... *Cook* .....} ss.

....*Probate*....Court of....*Cook*....County.

To the Honorable....*Charles S. Cutting*...., Judge of said Court:

Your....*petitioner, James Hardy, shows*....that one....*William Jones*....is a resident of said County, and has an estate not exceeding in value, as your....*petitioner is*....informed and....*believes*...., the sum of ....*Ten Thousand* (*$10,000.00*)....Dollars.

That said....*William Jones*....is a....*lunatic*....and wholly incapable of managing said estate or transacting business.

That your....*petitioner is a relative*....of said....*William Jones*.... and therefore....*prays*....that a jury may be summoned by this court to ascertain whether said....*William Jones*....be a....*lunatic*...., and if the jury return in their verdict that said person is a....*lunatic*...., then, that this court may appoint....*this petitioner*....or some other fit person, ...*conservator*....of said....*William Jones*....and of....*his*....estate.

Your....*petitioner*....further....*prays*....that a summons may be issued for said....*William Jones*....to appear on the hearing of this petition and show cause, if....*he*....can, why the same should not be granted, and abide the order of this court; and that such further proceedings may be had in the premises as may be authorized by law and may seem proper to the court.

JAMES HARDY....

NOTE. Affidavit of truth of petition acknowledged before authorized official should accompany. See No. 199. By statute, county courts or probate courts are usually given jurisdiction to protect insane or lunatic persons. There is an interesting article in 16 Virginia Law Register, page one, giving authorities to show that equity still has jurisdiction of such matters in many jurisdictions, even though statutes have been passed giving jurisdiction to a special court. If petition is filed in a court of chancery, the bill should be drawn in the usual form of chancery bill. See Nos. 126 to 130, inclusive.

208. Proof of Claim Against an Estate.

STATE OF....*ILLINOIS*....
County of ..... *Cook* .....} ss.

In the....*Probate*....Court, ...*Cook*....County.

....*Henry Jones*...., being duly sworn, on oath says: The annexed claim against the estate of....*Frank Warren*...., Deceased, amounting to the sum of....*Three Hundred Fifty* (*$350.00*)....Dollars, is just and unpaid, after allowing all just credits.

HENRY JONES....

NOTE. Add acknowledgment before authorized official.

209. Release of Dower.

KNOW ALL MEN BY THESE PRESENTS, That I, ...*Rebecca Porter*...., of....*Evanston*...., in the County of....*Cook*...., in the State of....*Illinois*...., widow of....*Francis Porter*...., late of said County and State, in consideration of....*Five Thousand* (*$5,000.00*)....

Dollars, to me paid by....*Henry Porter*...., of....*Savanna*...., in the County of....*Carroll*...., in the State of....*Illinois, son*....of the said ....*Francis Porter*...., deceased, the receipt whereof is hereby acknowledged, do hereby grant, remise, release, and forever quitclaim unto the said ....*Henry Porter, his*....heirs and assigns forever, all the dower right, title, interest and demand whatsoever which I may have in law or in equity, in all of the lands, tenements and real estate whereof the said....*Francis Porter*....was seized or possessed, so that neither I, my heirs, executors, administrators, or assigns, nor any other person or persons for me shall have any claim, demand or right of dower in and to said lands or any part thereof, but shall be utterly barred and excluded forever.

IN WITNESS WHEREUNTO, I have this....*tenth*....day of....*August*....A. D....*1914*....set my hand and seal.

REBECCA PORTER....[SEAL]

NOTE. Add acknowledgment before authorized official. See No. 17.

210. Trust Devise.

I, ...*Elizabeth Jones*...., of....*Lanark*...., in the County of ....*Carroll*...., in the State of....*Illinois*...., hereby revoke all former wills made by me, and declare this to be my last will and testament.

I devise and bequeath all my real estate of every nature, and all my personal estate and property whatsoever, to....*Henry Frank and William Whalen*...., Trustees, and to the survivor of them and their successor or successors in trust and their heirs, executors and administrators according to the nature thereof, upon trust during the minority of my....*son Henry*...., at the discretion of my trustees to apply the whole or any part of the annual income of said trust premises for or toward the maintenance, education or benefit of my said....*son*....

I direct my said trustees to accumulate the surplus of the annual income by investing the same during my said....*son's*....minority in any way usually considered proper in the handling of trust funds, in the enlargement of the trust premises, and to follow the destination of the capital of the said trust estate, but with power to apply the accumulations of any preceding year or years for the maintenance, education or benefit of my said....*son*....in any succeeding year or years.

When my said....*son*....shall attain the age of....*21*....years my said trustees shall pay and transfer to....*him*....absolutely the said trust property or as much thereof as shall not have been applied or disposed of during the preceding trust; but if my said....*son*....shall die, either in my lifetime or after my decease, under the age of....*21*....years, or shall die in my lifetime after attaining that age, but without leaving issue surviving me, then my trustees shall hold the trust property upon trust from and after the death of the survivor of myself and my said....*son*...., to pay the annual income of said property to my....*sister Helen*....during....*her*.... life, and upon....*her*....death to pay thereout the sum of....*One Thousand* (*$1,000.00*)....Dollars to....*each of*....my....*other sisters, Jane*

and Rebecca....; and to hold the ultimate residue of the said trust property in trust for the heirs of my....*sister Helen*....

I authorize my said trustees for the time being under this will, to sell the whole or any part of both the real and personal trust property at private sale or public auction, at their discretion, for any of the purposes connected with the trust estate, or the management thereof, and to execute and deliver such deeds or other instruments of transfer as may be necessary to pass proper title to the same.

I further authorize my said trustees to lease all or any part of the real estate held by them under the trusts of this will for such term or terms, and upon such conditions, as they shall see fit, and generally to manage and improve said real estate in such manner as they shall deem best for the trust premises.

I appoint the said....*Henry Frank and William Whalen*....Trustees, hereunto named, to be executors of this my will.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ....*tenth*....day of....*August*....A. D....*1914*....

Witnesses:

....*DAVID SMITH*..... *ELIZABETH JONES*....[SEAL]

....*WILLIAM WARREN*....

....*WILLIAM HENRY* .....

211. Will.

IN THE NAME OF GOD, AMEN. I, ...*Alice Williams*....., of ....*Berwyn*...., in the County of....*Cook*....and State of....*Illinois*...., being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make, ordain, publish and declare this to be my last WILL and TESTAMENT:

FIRST, I order and direct that my....*Executrix*....hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

SECOND, After the payment of such funeral expenses and debts, I give, devise and bequeath unto....*Henry Williams*...., my....*brother*...., the sum of....*Five Hundred* (*$500.00*)....Dollars, and all the remainder and residue of my estate I give, devise and bequeath unto my....*niece, Gladys Cook*....

Lastly, I make, constitute and appoint....*Helen Williams*....to be ....*Executrix*....of this, my last Will and Testament, hereby revoking all former Wills by me made.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal, the....*fourth*....day of....*August*....in the year of our Lord one thousand nine hundred and....*fourteen*....

ALICE WILLIAMS....[SEAL]

This Instrument was on the day of the date thereof signed, published and declared by the said....*testatrix, Alice Williams*...., to be....*her*....last Will and Testament, in the presence of us who at....*her*....request have subscribed our names thereto as witnesses, in....*her*....presence, and in

the presence of each other, and we believe said....*testatrix*....at this time to be of sound and disposing mind and memory.

JAMES SMITH.....
HENRY ALLEN.....
ALEXANDER JONES....

NOTE. In preparing a will it is very important to note how many witnesses are required by the statutes of the particular jurisdiction where the party resides.

Nevada is the only state in the Union where a seal is required to a will. Most of the states require two witnesses. Three witnesses are required in Kentucky, Georgia, Maine, Massachusetts, New Hampshire, North Carolina, South Carolina and Vermont. It is better to have at least one more witness than the statute requires, if possible, for it obviates the necessity of producing secondary proof where the number of witnesses required by statute cannot be produced. When proving a will, only the number of witnesses required by statute need be produced.

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Librarian, Law School, University of Chicago

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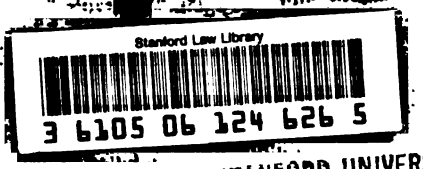

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